

REPORT Nº 65/05
PETITION 777/01
ADMISSIBILITY
ROSENDO RADILLA PACHECO
MEXICO
October 12, 2005

I. SUMMARY

1. On November 15, 2001, Tita Radilla Martínez, Vice-President of the Association of Relatives of Disappeared Detainees and Victims of Human Rights Violations in Mexico ("AFADEM"), and the Mexican Commission for the Defense and Promotion of Human Rights, A.C. ("CMDPDH") (hereinafter, jointly, "the petitioners") presented the Inter-American Commission on Human Rights (hereinafter, "the Commission" or "the IACHR") with a petition claiming the international responsibility of the United Mexican States (hereinafter, "Mexico" or "the State") for violating against Rosendo Radilla Pacheco the following rights protected by the American Convention on Human Rights (hereinafter the "American Convention"): Articles 4 (right to life), 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), 25 (right to judicial protection); along with the violation of the obligations set forth in Article 1(1) (obligation to respect rights) of the American Convention. Also, petitioners denounced¹ the violation of Articles I, II, IX, XI and XIX of the Inter-American Convention on Forced Disappearance of Persons.²

2. According to the allegations of the petitioners, on August 25, 1974 Mr. Rosendo Radilla Pacheco, who was 60 years old at the time, was detained at the entrance to the Cuauhtémoc neighborhood in Atoyac de Álvarez municipality, state of Guerrero, and that he has been disappeared since that date. The petitioners claim that continuous violations are involved since the situation persists to date in that the whereabouts of the alleged victim has not been determined and because the perpetrators have been neither identified nor punished. Further, the petitioners hold that the Mexican State is internationally responsible for the denial of justice suffered by the relatives of the alleged victim, on the basis of the events that happened after the alleged disappearance. Accordingly, the petitioners allege that the facts denounced constitute violations of the American Convention, as well as of the Inter-American Convention on Forced Disappearance of Persons. The State, for its part, alleges that domestic remedies were not exhausted with respect to this petition.

3. Without prejudging the merits of the case, in this report the IACHR concludes that the petition is admissible in that it meets the requirements set by Articles 46 and 47 of the American Convention, and that the Commission is competent to hear and decide on the merits. Consequently, the Inter-American Commission decides to notify the parties of this decision and to continue with its analysis of the merits as regards the alleged violation of Articles 4, 5, 7, 8, 25 in connection with Article 1(1) of the American Convention and of Articles II and III of the Inter-American Convention on Forced Disappearance of Persons; it also resolves to make this report public and to publish it in its Annual Report to the General Assembly of the OAS.

II. PROCESSING BY THE COMMISSION

4. Processing of this petition began on January 14, 2002, with a request for the State to submit its comments within a period of two months, in accordance with Article 30 of the IACHR's Rules of Procedure. The parties continued to send comments and additional information until the Inter-

¹ Communication dated June 18, 2002

² The Inter-American Convention on Forced Disappearance of Persons entered into effect on March 28, 1996. Mexico deposited the instrument of ratification on April 9, 2002-

American Commission determined that the positions of each had been adequately defined. On October 21, 2004, during its 121st session, the IACHR held a hearing on this matter.

III. POSITIONS OF THE PARTIES

A. Petitioners

5. The petitioners state that prior to his disappearance, Rosendo Radilla Pacheco worked in providing social support services to the community of Atoyac in the state of Guerrero. They report that on August 25, 1974, the alleged victim was traveling in a bus, in the company of his son, when the vehicle was stopped by a military checkpoint for inspection, whereupon Mr. Radilla Pacheco was immediately detained. Later, they state, Mr. Radilla Pacheco was apparently taken to the Atoyac military barracks,³ where he was kept under illegal arrest for approximately one month and subjected to torture.⁴

6. The petitioners claim that, at first, the alleged victim's next-of-kin were afraid to report the incident, fearing the State's reprisals.⁵ In spite of this, they say, the family explored several avenues in their attempts to locate him. This consisted of a meeting with Professor Manuel Cabañas, representative of the Governor of Guerrero, Rubén Figueroa Figueroa, who allegedly told them that Mr. Radilla Pacheco was in Military Fort No. 1, in Mexico City. They also state that six months later a person who identified himself as "Neri" asked them for twelve thousand pesos to help them locate the alleged victim, but that when the date arrived they were told that Mr. Rosendo Radilla Pacheco had already died. Some time later, the family and their representatives lodged briefs reporting the alleged facts with different agencies. In 1990, shortly after the creation of the National Human Rights Commission (CNDH),⁶ his relatives lodged a complaint about this incident with that public body. On March 27, 1992, they filed another complaint with the office of the Guerrero State Attorney General for Justice (PGJE). In connection with the same incidents, on May 14, 1999, a complaint was lodged with the municipal authorities in Atoyac de Álvarez. Additionally, on October 20, 2000,⁷ they lodged a criminal complaint regarding the forced disappearance of Rosendo Radilla Pacheco and others with the PGJE. However, the state Office of the Public Prosecutor recused itself and referred the case to the office of the Public Prosecutor for Military Justice.⁸ On November 29, 2000, a complaint was filed with the office of the Attorney General of the Republic; this was ratified on March 29, 2001. The petitioners add that on January 3, 2001, another complaint regarding Rosendo Radilla Pacheco's disappearance was lodged in the state of Guerrero, and this was referred to the prosecutor's office on grounds of incompetence on October 25, 2002.

7. In spite of the number of claims filed, the petitioners maintain that as of the lodging of their petition with the IACHR no steps had been taken to clarify what had happened to Mr. Rosendo Radilla or his whereabouts, and so they question the effectiveness of the instruments available

3 In connection with this, the petitioners maintain that "there are various testimonies – all of which are consistent and agree with each other – that claim that Rosendo Radilla was detained until September 30, 1982, at the military barracks located in the town of San Benítez, Atoyac municipality." Petitioners' submission, received June 19, 2002.

4 Petitioners' submission, received November 15, 2001, reporting the testimony of another individual held at the same military facility: "According to the signed statement, September 30, 1982, was the last time he saw Mr. Rosendo; later, the witness was released."

5 According to AFADEM's records, between 1974 and 1978 approximately 500 disappearances took place in the state of Guerrero. In addition, in a submission received on June 19, 2002, the petitioners claim that the dangers and vulnerability faced by the relatives during the so-called "dirty war" waged in Mexico in the late 1970s and early 1980s prevented family members from reporting Rosendo Radilla Pacheco's arrest to the law enforcement agencies.

6 The petitioners state:

Following the complaint filings and the CNDH's investigations, on November 27, 2001, the CNDH presented to President Fox and to public opinion a "Special Report on complaints alleging forced disappearances during the 1970s and early 1980s" which gave rise to recommendation 26/2001.

Petitioners' submission, October 21, 2004.

7 Date corrected by means of a petitioners' submission received on February 22, 2003.

8 Petitioners' submission, received February 6, 2003. This filing led to preliminary investigation SC/34/2000/IV/I/E.

under domestic law. They also claim that the domestic remedies are ineffective, specifically as regards forced disappearances, since the remedy of *amparo* is neither ideal nor appropriate in light of the legal requirements whereby the beneficiary must ratify its presentation, indicating both his whereabouts and the authority involved.⁹ Consequently, they maintain that the exception provided for in Article 46(2)(a) of the American Convention is applicable in this case.

8. The petitioners also point out the time that has passed since 1974, when the alleged victim was arrested and then disappeared. They note that since the first formal complaints lodged with the authorities, there has been no progress with the investigation, no steps have been taken with respect to the perpetrators, and no answers have been obtained regarding the truth of the matter or about the whereabouts of Rosendo Radilla Pacheco.

9. With respect to the applicability of the Inter-American Convention against Forced Disappearance, the petitioners claim that the crime remains ongoing. They maintain that the relatives of the disappeared person are also victims, in that they are subject to a distressing uncertainty that will not go away until the fate of their disappeared loved one is clarified.

10. The petitioners maintain that there has been an unwarranted delay in the investigation of this incident, which would be grounds for the exception to the domestic remedy exhaustion requirement provided for in Article 46(2)(c) of the American Convention on Human Rights. The petitioners base their argument on the period of twelve years that has passed since the first complaint and the almost three years since the creation of the office of the Special Prosecutor for Investigating Incidents Probably Constituting Federal Crimes Committed Directly or Indirectly by Public Servants against Individuals with Ties to Social or Political Movements of the Past ("FEMOSSP"), during which time no concrete results were attained.

11. Finally, the petitioners hold that the FEMOSSP procedure has proved ineffective and they note in this regard that in spite of the time that has gone by, there have been no concrete results in the case of Rosendo Radilla Pacheco. The petitioners believe that the work of the Special Prosecutor focused on verifying whether or not a disappearance took place, but that no efforts have been made to punish the guilty or to locate the alleged victim. However, they state that they continue to participate, in good faith, in the Special Prosecutor's ongoing investigation.

B. State

12. In its communications, the Mexican State does not question the competence of the Inter-American Commission to hear this petition, but it does argue the non-exhaustion of domestic remedies as grounds for the complaint's inadmissibility.

13. At first the State claimed that the first formal complaint regarding the incident was made several years after the disappearance occurred, which made it materially impossible for the State

⁹ The law in question provides that:

Article 17. In the case of actions that pose a threat to life, attacks on personal liberty outside judicial procedures, deportations or exiles, or any of the actions prohibited by Article 22 of the Federal Constitution, and the victim is unable to pursue the *amparo*, any other person, including minors, may do so on his behalf. In such a case, the judge shall order all the measures necessary to summon the alleged victim and, thereafter, shall require him to ratify the *amparo* filing within the following three days; if the party involved ratifies, the proceedings will be pursued; if he does not ratify it, the filing shall be taken as not having been lodged, and all the measures ordered shall be left without effect.

Article 117. In the case of actions that pose a threat to life, attacks on personal liberty outside judicial procedures, deportations or exiles, or any of the actions prohibited by Article 22 of the Federal Constitution, it shall be sufficient, for the application to be admitted, for it to identify the action regarding which the claim is made; the authority that ordered it, if the person filing it is able to; the place where the victim is located; and the authority or agency that should execute or attempt to execute the action. In such cases the application may be made by means of an appearance, with a deed being drawn up before the judge.

Amparo Law, regulating Articles 103 and 107 of the Political Constitution of the United Mexican States, updated as of June 23, 2005

to secure the minimum evidence needed to conduct an investigation.¹⁰ It added that in such a situation, procedural activity by the victims was indispensable for the State to act and set about finding Mr. Radilla Pacheco's whereabouts, and that the alleged victim's relatives could have filed an *amparo* suit with the federal judiciary. The State also notes that in spite of the time that had gone by, the complaints they lodged were dealt with, but that the lack of evidence and clues prevented the corresponding inquiries from making progress.

14. The State also notes that following the commitment of President Vicente Fox as set out in the Agreement published in the Official Journal of the Federation on November 27, 2001,¹¹ several judicial mechanisms were brought into place for crimes committed against individuals involved in social and political movements of the past. To this end, on January 4, 2002, the Attorney General of the Republic appointed the Special Prosecutor for Investigating Incidents Probably Constituting Federal Crimes Committed Directly or Indirectly by Public Servants against Individuals with Ties to Social or Political Movements of the Past.¹² The case of Mr. Radilla Pacheco is being studied by that special prosecutor's office, says the State, with a view toward taking the pertinent steps.

15. The State reiterates that it has pursued a range of measures to investigate the events of the past, including the creation of the FEMOSSP and the opening up of official archives. Based on this, it holds that the available domestic remedies must first be exhausted prior to involving this international body and that, consequently, the instant petition should be dismissed.

IV. ADMISSIBILITY

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

16. According to Article 44 of the American Convention on Human Rights (hereinafter "American Convention"), the petitioners in this matter are entitled to present the petition, which contains allegations of incidents that presumably constitute violations of the human rights of an individual subject to the jurisdiction of the State. Also, it must be pointed out that the rights to life, liberty, personal security and integrity, as well as the right to justice, have been recognized and enshrined in Articles I and XVIII of the American Declaration on the Rights and Duties of Man. The Commission considers that between August 1974 and April 1982, the temporal competence of the IACHR in this matter derives from the American; after that date, its competence is based on the American Convention.¹³ The Inter-American Commission also has competence under the Inter-American Convention on Forced Disappearance of Persons, in that the alleged incidents constitute a situation of continuity that persists as of the date of this report.¹⁴

17. In consideration of the foregoing and the contents of the case file, the Commission rules that it has personal, material, and temporal competence to hear and to rule on the merits of this petition.

B. Other admissibility requirements

18. The Commission will now examine the admissibility requirements set out in Articles 46 and 47 of the American Convention.

10 Submission from the State, received April 15, 2002.

11 "In that Agreement the federal Attorney General of the Republic is requested to combine and discharge the investigations and to pursue the preliminary inquiries begun as a result of complaints or disputes dealing with this matter." Submission from the State, received April 15, 2002.

12 Submission from the State, received April 15, 2002.

13 The American Convention came into force in Mexico on April 3, 1982

14 Mexico deposited its instrument of ratification of the Inter-American Convention on Forced Disappearances on April 9, 2002.

1. Exhaustion of domestic remedies

19. As regards this requirement, the Commission notes that the State explicitly invoked the failure to exhaust domestic remedies; consequently, a detailed analysis of this question is necessary.

20. The parties' submissions refer to the requirements set in Mexican law for *amparo* remedies to be filed and processed. The Inter-American Commission holds, for the purposes of admissibility, that the fact that in this specific case it was impossible to meet those requirements makes that remedy ineffective in providing the protection that it could, in other circumstances, possibly provide. In addition, the Commission notes that more than thirty years have gone by since the incident allegedly occurred and more than thirteen years since the first complaint was filed, without the competent authorities determining the whereabouts of the alleged victim or the fate of his remains and, clearly, without identifying or punishing the guilty. In this case, therefore, there has been an unwarranted delay and the domestic remedies available in Mexico have proved ineffective.

21. The Commission must take into account the reports drawn up on the general situation in the region;¹⁵ the claimed general impossibility of securing access to justice in this specific case; the establishment of the FEMOSSP; the State's exclusive control over the means and evidence in the investigation; and the various attempts made by the alleged victim's next-of-kin to report the alleged incident to the authorities. With that in mind, and without prejudging the merits of the matter, the IACHR believes that at the time of Rosendo Radilla Pacheco's alleged forced disappearance there was, among the population, a grounded fear that could justify the impossibility of reporting the facts of this particular case to the competent authorities. In that context, the efforts made by Rosendo Radilla Pacheco's relatives and representatives to secure justice through domestic channels are deemed reasonable.

22. In consideration of the foregoing, the Commission applies to this matter the exception of "unwarranted delay in deciding" on those remedies, as provided for in Article 46(2)(c) of the American Convention and, consequently, it relieves the petitioners of the need to comply with that requirement.

2. Timeliness of the petition

23. Article 46(2) of the American Convention provides that an unwarranted delay in rendering a final ruling on domestic remedies shall preclude the requirement of exhausting domestic remedies and of lodging the petition within six months following notification of the final judgment. Similarly, Article 32(2) of the IACHR's Rules of Procedure stipulates that:

In cases in which the exceptions to the prior exhaustion requirement are applicable, the petition must be presented within what the Commission deems to be a reasonable period of time. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

24. The alleged forced disappearance of Rosendo Radilla Pacheco began on August 25, 1974, when he was arrested in the state of Guerrero. The instant petition was lodged with the IACHR on November 15, 2001, after long years spent filing claims with various national agencies in order to secure an investigation of Rosendo Radilla Pacheco's whereabouts. The circumstances surrounding this case, as described in the section of this report dealing with the exhaustion of domestic remedies, indicate the fear and difficulties faced by the petitioners from the time of the incident until the conditions changed enough for them to be able to lodge the complaint. That occurred in 1990, when the CNDH was created and "various families and organizations felt sure enough to lodge

¹⁵ IACHR, Report on the Situation of Human Rights in Mexico, September 24, 1998, OEA/Ser.L/V/II.100 Doc. 7 rev. 1.

accusations regarding disappearances.”¹⁶ In addition, following the change of government in December 2000, they lodged a fresh claim.

25. The Inter-American Commission notes that more than 31 years have passed since Rosendo Radilla Pacheco’s alleged disappearance, 13 years since the filing of the first complaint, and more than three years since the appointment of the FEMOSSP, and yet no specific progress has been made in locating the alleged disappearance victim or in investigating or punishing the guilty. As of the date of this report’s adoption, the investigation of the case in Mexico is still a pending matter.

26. In the IACHR’s view, based on the above information, the petition was lodged within a reasonable time per the terms of Article 32(2) of its Rules of Procedure.

3. Duplication of proceedings

27. The Commission has received no information from either the parties or other sources to indicate that the substance of the instant petition is pending in any other international settlement proceeding.

4. Characterization of the alleged facts

28. Article 47 paragraphs (b) and (c) of the American Convention states that the Commission shall consider inadmissible any petition or communication that “does not state facts that tend to establish a violation of the rights guaranteed by this Convention” or where “the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order”.

29. The Inter-American Commission takes into account the context within which the alleged incidents took place and it believes the petitioners’ representations describe events that, if proven true, could tend to establish violations of the right to life, to humane treatment, to personal liberty, to a fair trial, and to judicial protection as set forth, respectively, in Articles 4, 5, 7, 8, and 25 of the American Convention, all in conjunction with Article 1(1) thereof. Accordingly, the Commission considers that Articles II, IX, XI and XIX of the Inter-American Convention on Forced Disappearance of Persons could apply. The IACHR therefore holds that the requirement set in Article 47(b) of the American Convention has been met and decides that the incident warrants a closer and more complete study during the merits phase.

V. CONCLUSIONS

30. The IACHR concludes that it is competent to hear this petition and that it is in compliance with the admissibility requirements set out in Articles 46 and 47 of the American Convention and the corresponding articles of its Rules of Procedure. Based on the legal and factual considerations contained in this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare, without prejudging the merits of the case, that the petition is admissible as regards the alleged facts and with respect to Articles 4 (right to life), 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), and 25 (right to judicial protection) of the American Convention; the obligation to respect those rights described in Article 1(1) thereof; and

¹⁶ Petitioners’ submission, October 21, 2004, paragraph 13, p. 3.

Articles I, III, IX, XI and XIX of the Inter-American Convention on Forced Disappearance of Persons.

2. To notify the parties of this decision.

3. To continue with its study of the case, and

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

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 12th day of October 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez Trejo, and Florentín Meléndez, Commissioners.