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Title/Style of Cause: Emiliano Castro Tortrino and Maria del Carmen Tortrino v. Argentina
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Decided by: Chairman: Carlos Ayala Corao;
First Vice Chairman: Robert K. Goldman;
Second Vice Chairman: Jean Joseph Exume.
Dated: 2 March 1998
Citation: Castro Tortrino v. Argentina, Case 11.597, Inter-Am. C.H.R., Report No. 7/98, OEA/Ser.L/V/II.102, doc. 6 rev. (1998)
Represented by: APPLICANT: Estela Barnes de Carlotto
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1. On March 10, 1996, Estela Barnes de Carlotto, as the President of the nongovernmental organization known as "Abuelas de la Plaza de Mayo," (hereinafter "the petitioner") filed a complaint with the Inter-American Commission on Human Rights (hereinafter "the Commission"), against the Argentine Republic (hereinafter either the "State" or "Argentina"), for failure to comply with its obligation to respect rights (Article 1) and for violating rights to recognition of juridical personality (Article 3), protection of the family (Article 17.1), name (Article 18), child (Article 19), equal protection (Article 24), and judicial protection (Article 25), as enshrined in the American Convention on Human Rights (hereinafter "the American Convention").

I. EVENTS DENOUNCED

2. Maria del Carmen Tortrino was kidnapped on March 22, 1977, along with her son, Emiliano Castro Tortrino, a minor.[FN5] On the night of March 23, 1977, Pedro Pablo Tortrino, the father of Maria del Carmen, received a call from an anonymous person who told him that his daughter, Maria del Carmen, had been kidnapped and that his small grandson, Emiliano, eight months old, was at police station 29 in the federal capital city. Mr. Tortrino went to that police station in the company of a policeman who was a personal friend. There he was told by Judge Jorge Mario Muller, the head of the National Criminal and Correctional Court O, of the federal capital, that he, the judge, had ordered the child placed in a sanitarium.

[FN5] See, inter alia, Report No. 48/97 (Case No. 11,520 - Tomás Porfirio Rondin and others, "Aguas Blancas Massacre", Mexico), OEA/Ser/L/V/II.98, February 18, 1998, par 50.

3. Judge Jorge Mario Muller, head of the National Criminal and Correctional Court O of the federal capital, personally opened case No. 890, filed as "NN, Violation of Law 13944," on March 23, 1977.[FN1] On March 25, 1977, Judge Muller turned the child over to Domingo Gabriel Maggiotti, an attorney --and a friend of the judge, according to the petition--, for temporary custody. On that same date, the judge sent a letter to the Civil Registry, to record the child's birth date as September 7, 1976. On April 29, 1977, the decision was made to award final custody and then full adoption of the child to Domingo Maggiotti. After adoption, the child was known as Juan Pablo Maggiotti.[FN2] The petitioner emphasizes that within the space of four weeks, the child was deprived of his name, his case was disposed of, and no investigation was carried out.

[FN1] The offence that was investigated consisted of the alleged abandonment of the minor child by his parents.

[FN2] The adoption process was started by Domingo Maggiotti, the attorney, on August 30, 1977. On October 13 of that same year, the decree of full adoption of the child was issued to Maggiotti.

4. The information received by Pedro Pablo Tortrino at police station 29 was that the child who had been found had a perforated palate (commonly known as harelip). Since he was sure that the child in question was his grandchild, who had this physical characteristic, Pedro Pablo Tortrino filed a charge on April 5, 1977 for the disappearance of Emiliano Castro Tortrino with National Civil Court No. 1, where it was recorded as case No. 25946.

5. On June 28, 1977, Judge Muller opened case No. 178, "Muller, Jorge, Charge," for the purpose of investigating irregularities in the birth certificate record of the child Juan Pablo Maggiotti and the child's identification document. In March 1978, Pedro Tortrino appeared before the court in this case and stated that he had requested possession of his grandson in the civil proceeding and that he had objected to the adoption. On December 1, 1978, Juan Alberto Castro, the child's paternal grandfather, also appeared before the court and asked to see the file documents. He stated that he had documentation in a notary public office that proved that the child who had been adopted was his grandson, Emiliano Castro Tortrino. The petitioner indicates that in view of this fact, Mr. Castro and his sponsoring attorney were punished procedurally and immediately afterward, the two began to receive anonymous threats, as did the notary public. This resulted in the withdrawal of the two from the case which brought to an end the family's possibilities of recovering the child.

6. In 1989, after democracy was restored in Argentina, the federal judge in Criminal and Correctional Court No. 3, of the federal capital, ordered that a blood test for genetic histocompatibility be taken of the child Juan Pablo Maggiotti, in case No. 178, mentioned above, following the intervention of federal agents who were designated to handle cases involving minors who were the victims of forced disappearance. This decision was challenged by Domingo Maggiotti in Court II of the Criminal and Correctional Chamber, which upheld the order to take the blood test. Following this, the Supreme Court of Justice of the Nation, in deciding on the

appeal presented by Domingo Maggiotti, allowed the appeal on the understanding that the test challenged was not related to the purpose of the case.

7. On December 6, 1990, the Federal Criminal and Correctional Court No. 3 opened case No. 9264/90, to hear the claim filed by Juan Alberto Castro, for the crimes of detention and hiding of a minor.[FN3] Once again, the same federal judge ordered another genetic blood test of Juan Pablo Maggiotti and his presumed paternal grandparents. As he had done in case 178, Domingo Maggiotti appealed this measure before Chamber II of the National Appeals Court for Criminal and Correctional Matters. That court issued its ruling on April 15, 1994 and upheld the decision of the judge in the previous court.

[FN3] A punishable act described in Article 146 of the Argentine Penal Code.

8. After this appeal ruling, Domingo Maggiotti prepared a special appeal which was denied, and for this reason filed another appeal with the Supreme Court of Justice of the Nation. In its ruling of the December 4, 1995, the Supreme Court declared that the criminal action had been extinguished through prescription, arguing that "since the date of commission of the illicit acts...there had been no procedural act to interrupt the prescription..."[FN4]

[FN4] Supreme Court of Justice of the Nation, Castro/Juan Alberto, complaint for detention and hiding of minor, ruling of December 4, 1995, page 2.

II. PROCESSING BY THE COMMISSION

9. The Commission transmitted the pertinent parts of the claim to the State on March 21, 1996. The Commission asked Argentina to provide it with pertinent information within a term of 90 days.

10. On June 20, 1996, the State requested an extension of the deadline to provide information on this case. The Commission granted the extension on that same date. The Commission granted a second extension on August 23, 1996, at the request of the State.

11. In a letter dated September 23, 1996, the State gave a two-part response to the Commission's request. First, it accepted that the decision of the Supreme Court of Justice of the Nation which decreed that prescription applied to the criminal action had exhausted domestic remedies under the terms of Article 46.1.a of the American Convention. Second, it argued that to the extent that the court's ruling did not deal with a matter of substance but actually a prior exception whose declaration was official, its effects were formal in nature. In addition, the High Court's position on the basic issue of the case is in favor of the measure, as it expressed it in its decision on the same date adopted in case No. 197/90.

12. The State's response was forwarded to the petitioner on September 30, 1996. On November 19 of the same year, the petitioner presented her reply which was sent to the State on November 20, 1996.

13. On December 20, 1996, the State presented its observations to the Commission on the petitioner's reply. In turn, the petitioner forwarded her comments on the State's answer on June 15, 1997.

14. In a letter dated January 21, 1997, the State remitted to the Commission a copy of the ruling of the Supreme Court Justice of the Nation dated December 27, 1996, as well as a press clipping referring to the "Abuelas de Plaza de Mayo."

III. ADMISSIBILITY

15. The Commission's ruling on the admissibility of cases that come before it has the purpose not only of producing greater clarity and legal certainty in its decisions but also focusing the parties on the central issues of the case.[FN5]

[FN5] See, inter alia, Report No. 48/97 (Case No. 11,520 - Tomás Porfirio Rondin and others, "Aguas Blancas Massacre", Mexico), OEA/Ser/L/V/II.98, February 18, 1998, par 50.

16. With respect to the requisites of admissibility established in Article 46 of the American Convention, the Commission notes that the State has expressly recognized the exhaustion of domestic remedies, and has not questioned compliance with the other formal requisites.

17. In deciding on the admissibility of petitions, the Commission has clarified that the protection afforded by the supervisory organs of the Convention has an essentially subsidiary position with respect to the jurisdictional organs of the states. This is the foundation of the prior exhaustion of domestic remedies rule, and is also known as the "fourth instance formula." This concept limits the competence of the Commission to declaring a petition admissible or deciding if it does not describe the violation of any of the rights protected by the American Convention.

18. The Commission has established exceptions to the "fourth instance formula," in the following terms:

In democratic societies, where the courts function according to a system of powers established by the Constitution and domestic legislation, it is for those courts to review the matters brought before them. Where it is clear that there has been a violation of one of the rights protected by the Convention, then the Commission is competent to review.

The Commission has full authority to adjudicate irregularities of domestic judicial proceedings which result in manifest violations of due process or of any of the rights protected by the Convention.[FN6]

[FN6] Report No. 39/96 (case No. 11673, Santiago Marzioni, Argentina), Annual Report of the Inter-American Commission on Human Rights 1996, paragraphs 60 and 61, respectively, p.93.

19. In this case, although the petitioner charged that the rights protected in Articles 1, 3, 17.1, 18, 19, 24 and 25 of the American Convention had been violated, the facts brought up in the complaint imply that the complaint itself refers to a decision of a jurisdictional type that can take the concrete form of a violation of judicial guarantees and protection (Articles 8.1 and 25) as part of the overall obligation of the State to guarantee free and full exercise of the rights recognized by Article 1 of the American Convention.

20. The Commission notes that the State's response in this case does not question its admissibility under Article 47.b of the American Convention; it confines itself to asking the Commission, "...that it bear in mind the statements made in the context of case No. 11,597."

IV. CONCLUSIONS

21. The petition raises a colorable claim of violation of rights protected by the American Convention. Therefore, the Commission has full powers to decide the merits of the petitioner's claims.

22. Following the above analysis and conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES

- A. To declare that this case is admissible.
- B. To transmit this report to the Argentine State and to the petitioner.
- C. To place itself at the disposal of the parties for the purpose of arriving at a friendly settlement of the case, founded on respect for human rights recognized in the American Convention; and to invite the parties to declare to the Commission, within 30 days of transmittal of this report, their intention to initiate the friendly settlement proceeding.
- D. To continue analyzing the merits of the case.
- E. To make this report public, and to publish it in its Annual Report to the OAS General Assembly.