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PETITION 223-01

REPORT ON ADMISSIBILITY

MARISA ANDREA ROMERO AND R.B.L.
ARGENTINA

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PETITION 223-01
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MARISA ANDREA ROMERO AND R.B.L.¹
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DECEMBER 6, 2016

I. SUMMARY

4. On April 11, 2001, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission,” or “the IACHR”) received a petition filed by Marisa Andrea Romero (hereinafter “the petitioner”) against the Argentine Republic (hereinafter “Argentina” or “the State”). The petition was filed on behalf of herself and her daughter, the child R.B.L. (hereinafter “the alleged victim”) for alleged violations in the context of a family proceeding.

5. The petitioner argues that she requested the suspension of family visits by the father with their daughter because of alleged sexual abuses committed against R.B.L., but that she was not heard nor duly protected by the courts because of her condition as a child. She alleges that the State violated the rights to judicial guarantees, to equality before the law, and to judicial protection, as well as the right to protection of the honor and dignity and of the rights of the child of R.B.L.

6. The State argues that the facts set forth by the petitioner do not tend to establish human rights violations, for the rights to judicial guarantees and judicial protection of the alleged victim were respected at all times. It also argues that the petitioner failed to exhaust domestic remedies, as rulings that address the visitation regime are not final. Finally, it argues that the Commission would be sitting as a court of fourth instance if it were to decide to analyze the instant case, as it would be reviewing a judgment handed down by the domestic judicial authorities within the scope of their authority.

7. Without prejudging on the merits of the complaint, after analyzing the parties’ positions, and in keeping with the requirements provided for at Articles 46 and 47 of the American Convention on Human Rights (hereinafter “American Convention” or “Convention”), the Commission decides to find the case admissible for the purposes of the arguments regarding the alleged violation of the rights enshrined in Articles 5 (humane treatment), 8 (judicial guarantees), 19 (rights of the child), and 25 (judicial protection) of the Convention in relation to Articles 1(1) and 2 of the same Convention. The Commission also decides to notify the parties of this decision, publish it, and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BEFORE THE IACHR

8. The IACHR received the petition on April 11, 2001 and on November 30, 2001 it forwarded a copy of the pertinent parts to the State, which it gave two months to submit observations, pursuant to Article 30(3) of its Rules of Procedure then in force. On January 16, 2002, the State sought an extension to submit its observations, which was granted by the IACHR on February 2, 2002. On March 7, 2002, the State’s response to the petition was received; it was forwarded to the petitioner on April 19, 2002.

9. The petitioner submitted additional observations on March 1, 2004, November 18, 2008, December 16, 2011, and June 9, 2014. For its part, the State sent additional observations on March 19, 2002, and on April 8 and October 8, 2014. These communications were duly forwarded to the opposing party.

¹ At the express request of the petitioner, by communication of October 16, 2001, the name of the alleged victim (hereinafter “R.B.L.”) is being kept confidential as she was a minor at the time of the facts.

III. THE POSITION OF THE PARTIES

A. The position of the petitioner

10. The petitioner indicates that she was living with the father of the alleged victim, but that after having suffered several physical assaults at his hands she decided to end that union. Accordingly, through a private conciliation agreement, on October 2, 1997, they established a regime of visits for the father with the child R.B.L., who at the time was three years old.

11. She indicates that in May 1998 she began to note strange behavior in R.B.L., for she would hide each time her father would come by to pick her up, and she didn't want to speak with him by phone. In addition, she noted hematomas around the girl's inner thighs, which the father explained resulted from bumping herself while playing. She alleges that on May 18, 1998, the child told her that her father would kiss her with his tongue; accordingly she requested a meeting with the office of the psychologist at the kindergarten that R.B.L. attended. Subsequently her case was referred to the Center on Child Mistreatment and Abuse of the City of Buenos Aires to perform a psychological assessment of the child.

12. The petitioner stated that with the information that she pulled together, on May 29, 1998 she moved to have Collegial Family Court Number 1 of the Judicial Department of San Isidro (hereinafter Family Court) suspend the regime of visits agreed upon through private conciliation (that request was assigned file number 231/98). She also indicates that hours later the child's father filed a motion to expand the pre-existing visitation regime (which was assigned file number 237/98). She notes that the Family Court decided to join both motions in a single file, and ordered that the father's visits with the alleged victim be supervised by a female social worker.

13. According to the petitioner, in a hearing held in her absence, on August 27, 1998, the Family Court denied the motion to suspend the visitation regime and also set aside the order for visits to be supervised by the social worker, leaving in place the regime established in private conciliation until a final judgment were issued on the motion to expand the visitation regime that was filed by the father of R.B.L. In response to this situation the petitioner filed a motion to annul, which was rejected on October 19, 1998.

14. The petitioner notes that on November 27, 1998, the Family Court ruled to expand the visitation regime, as sought by the father of R.B.L. Pursuant to this decision, the father and daughter would spend a few days on vacation outside the city; she indicates that on January 21, 1999, one day before leaving, the child told her of her desire not to go with her father for fear that he would touch her intimate parts. She says that to calm her daughter down she told her that she could call if she wanted to return home before the time set. Four days later, on January 25, the petitioner states that her daughter asked her by telephone to come and get her.

15. In response to these new facts the petitioner filed a complaint with the Office for Minors No. 3 (Asesoría de Menores No.3) asking that the father be ordered to have no contact with the daughter; that request was forwarded to the same Family Court that had previously ruled against suspending the visitation regime. After medical examinations of the child by a gynecologist specialized in working with children and youth, on March 8, 1999, the petitioner filed a new complaint, presenting a medical certificate that certified that R.B.L. had "vulvitis and a tear at 3 o'clock in the hymen, compatible with digital manipulation." She also presented an analysis that showed a positive result for chlamydia.

16. The petitioner argues that on March 10, 1999, the Family Court cautioned her to comply with the visitation regime, for it not she could lose custody of the minor child. She notes that on March 17, 1999, she responded, asking once again that the father be ordered to have no contact, to protect R.B.L. Nonetheless, the Family Court dismissed her motion by ruling of October 18, 1999, without taking into consideration several probative elements and expert evidence indicating the existence of sexual abuse of the alleged victim, and without having first heard from her.

17. On December 10, 1999, the petitioner filed a special motion of inapplicability of the law in opposition to that order. The Supreme Court of Justice of the Province of Buenos Aires, by judgment of March 15, 2000, rejected the motion filed indicating that rulings that address the visitation regime are not final in the terms of Article 278 of the Code of Civil and Commercial Procedure. In response to that rejection, the petitioner filed a extraordinary federal appeal (*recurso extraordinario federal*) that was denied by the Supreme Court of Justice of the Province of Buenos Aires by resolution of July 12, 2000, reported on August 30, 2000, arguing that the discrepancy in terms of the final nature of the order challenged was not sufficient grounds to admit the federal appeal, especially when those issues go to the interpretation of laws and procedures by the local courts.

18. Finally, the petitioner indicates that on September 14, 2000, she filed a complaint appeal (*recurso de queja*) before the Supreme Court of Justice of the Nation, which was dismissed by order of July 12, 2001, as it was filed after the period indicated by the applicable law.

19. Based on the foregoing, the petitioner alleges that the State violated the rights recognized in Article 8, 11, 19, 24, and 25 of the American Convention to her detriment and to the detriment of her daughter.

B. The position of the State

20. According to the State, the facts set forth by the petitioner do not tend to establish violations of the Convention, for according to the pronouncements and reports of the administrative authorities who took cognizance of the case, the petitioner had persisted in the allegations of sexual abuse due to the bad relationship she had with the minor child's father. It argues she persevered in her position even despite the negative results of medical exams of R.B.L. In this respect, it notes that while there was an initial diagnosis of chlamydia it was ordered that a second test be done whose results, with greater certainty, discarded the presence of *Chlamydia tracomatis* in the alleged victim. Moreover, it refers to other lab exams that corroborated the negative result, as well as statements by psychologists who provided care to the alleged victim, who said that they could not affirm that she had suffered sexual abuse. It also argues that the judicial authorities understood, after weighing the evidence, that there was no clear evidence that the abuse had been proven or that the assailant was the father.

21. Similarly, the State argues that the petitioner failed to exhaust domestic remedies, since the Supreme Court of Justice of the Province of Buenos Aires held, on resolving its case, that rulings concerning the visitation regime are not final in nature. Thus, the petitioner had the opportunity to once against file her motion, so long as she presented the foundation required and the respective evidence to support it.

22. The State further notes that the factual circumstances alleged no longer persist since the allegations of sexual abuse against the father of R.B.L. were dismissed by a resolution to dismiss issued in his favor by the Public Ministry and confirmed on appeal. It also argues that the alleged victim R.B.L. and her father signed a conciliation agreement regarding child support payments.

23. It also argues that the IACHR is not a court of appeal that has the power to review judgments of the states' domestic jurisdictions, adopted by the courts within the scope of their authority and respecting due process guarantees, and that were it to do so it would be intervening as a "fourth instance," an aspect that also determines the inadmissibility of the petition.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

24. The petitioner is authorized, in principle, by Article 44 of the American Convention to file petitions with the Commission. The petition indicates as the alleged victim two individual persons, Marisa Andrea Romero and R.B.L., with respect to whom the Argentine State undertook to respect and ensure the rights enshrined in the American Convention. As regards the State, the Commission notes that Argentina has

been a state party to the American Convention since September 5, 1984, the date on which it deposited its instrument of ratification. Therefore, the Commission is competent *ratione personae* to examine the petition. In addition, the Commission is competent *ratione loci* to take cognizance of the petition, insofar as it alleges violations of rights protected in the American Convention in the territory of Argentina, a state party to that treaty.

25. The Commission is competent *ratione temporis* insofar as the obligation to respect and ensure the rights protected in the American Convention was already in force for the State on the date of the facts alleged in the petition. Finally, the Commission is competent *ratione materiae* given that the petition alleges possible violations of human rights protected by the American Convention.

B. Admissibility Requirements

1. Exhaustion of domestic remedies

26. Article 46(1)(a) of the American Convention requires prior exhaustion of the remedies available in the domestic jurisdiction, in keeping with generally recognized principles of international law, as a requirement for the admission of claims alleging a violation of the American Convention. This requirement has the purpose of allowing the domestic authorities to take cognizance of the alleged violation of a protected right and, if appropriate, to resolve the situation before it is taken up by an international body. Article 46(2) of the Convention provides that the requirement of prior exhaustion of domestic remedies is not applicable when: 1. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; 2. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them, or 3. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

27. The petitioner alleges that the sexual abuses committed by the father of the alleged victim were not timely and duly investigated by the competent authorities and that as a result of those omissions and lack of diligence she has not been able to obtain a fair resolution in the family proceedings initiated to prevent the visits of the alleged assailant with R.B.L. Accordingly, she considers that the various challenges presented against the visitation regime concluded with the ruling of the Supreme Court of Justice of the Nation of July 12, 2001, a judgment that exhausted available judicial remedies. For its part, the State indicates that domestic remedies were not exhausted since proceedings on visitation regime never reach finality, thus the petitioner would always be able to file her motion anew if it pulls together the elements that justify it.

28. In the instant case the IACHR observes that the proceedings on the visitation regime are never final and in this sense do not produce final decisions. The Commission also takes into account that the petitioner's main argument is that she could not obtain a judicial decision that protects the rights of her daughter due to the lack of diligence in the processing and investigation of the different requests and motions that she filed. In that regard, the IACHR understands that in the context of a complaint related to sexual abuse against a girl, what was alleged with respect to the purported shortcomings in the investigation poses an exception to the requirement of prior exhaustion in terms of the purported obstacles to access to a proper investigation and the alleged delay in carrying out any investigation. Therefore, considering the characteristics of the instant case, the Commission considers that the exceptions provided for at Article 46(2)(b) and (c) of the American Convention apply, and so prior exhaustion is not required.

29. Article 46(2) of the American Convention, given its nature and purpose, is a provision whose content is autonomous vis-à-vis the substantive provisions of the Convention. Therefore, the determination of whether the exceptions to the rule on exhaustion of domestic remedies provided for in that provision are applicable to the case in question is prior to and separate from the analysis of the merits, since it depends on a different standard of appreciation than 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 impeded the exhaustion of domestic

remedies in the instant case will be analyzed, as relevant, in the report the Commission adopts on the merits of the dispute, so as to determine whether in effect they constitute violations of the Convention.²

2. Timeliness of the petition

30. Article 46(1)(b) of the American Convention establishes that for a petition to be admissible by the Commission it shall be required that it be filed within six months from the date on which the alleged victim was notified of the final decision. In the claim under analysis, the IACHR has established that the exception to the prior exhaustion of domestic remedies applies as per Article 46(2)(b) and (c) of the American Convention. In this regard, Article 32(2) of the Commission's Rules of Procedure establishes that in those cases in which the exceptions to the prior exhaustion of domestic remedies apply, the petition must be filed within a time that the Commission considers reasonable. To that end, the Commission should consider the date on which the alleged violation of rights occurred and the circumstances of each case.

31. The petition before the IACHR was filed on April 11, 2001; the facts that are the subject matter of the claim are said to have occurred as of May 1998, and their effects are said to have continued to the present day. In view of these considerations, for purposes of admissibility the IACHR concludes that this petition has been filed within a reasonable time in the terms of Article 32(2) of the Commission's Rules of Procedure.

3. Duplication of procedures and international *res judicata*

32. It does not appear from the record that the subject matter of the petition is pending another international procedure for settlement or that it reproduces a petition already examined by this or any other international body. Therefore, the grounds of inadmissibility established at Articles 46(1)(c) and 47(d) of the Convention to not apply.

4. Colorable claim

33. For purposes of admissibility, the Commission must decide whether the facts alleged tend to establish a violation of rights, as provided for in Article 47(b) of the American Convention, or whether the petition is "manifestly groundless" or "obviously out of order," as per Article 47(c). The test for analyzing admissibility differs from that used for the analysis of the merits of the petition, given that the Commission performs only a *prima facie* analysis to determine whether the petitioners establish the apparent or possible violation of a right guaranteed by the American Convention. It is a summary analysis that does not imply prejudging or issuing a preliminary opinion on the merits issues.

34. In addition, neither the American Convention nor the Rules of Procedure of the IACHR require that the petitioner identify the specific rights alleged to have been violated by the State in the matter submitted to the Commission, although petitioners may do so. It is up to the Commission, based on the case-law of the system, to determine in its admissibility reports what provision of the relevant inter-American instruments is applicable and whose violation could be established if the facts alleged are proven by sufficient evidence.

35. In the instant case the petitioner argues, first, that no court heard the alleged victim R.B.L. during the judicial process, and the domestic remedies she pursued at no time resulted in a diligent investigation and consequently did not have the specific effect of protecting her. She alleges that even though she presented grave indicia of the existence of sexual abuse no court suspended the father's visitation rights or took any measure to safeguard the minor child's integrity.

36. At the same time, the State indicates that the decisions of the courts were based on the father's right to visitation, which is also a fundamental right, and that the motives for requiring a suspension

² IACHR, Report No. 48/15, Petition 79-06. Admissibility. Yaqui People. Mexico. July 28, 2015, para. 56.

of the visits were not duly shown by the petitioner. In addition, it argues that such judgments are never final and therefore could be modified if the parties produce new evidence. Finally, the State notes that if the Commission were to decide to study the instant case, it would be sitting as a court of fourth instance.

37. In view of the elements of fact and law presented by the parties and the nature of the matter put before it, the IACHR considers that if the lack of judicial protection in the context of allegations of sexual abuse and proceedings aimed at suspending visitation are proven, the facts alleged could constitute possible violations of the rights protected in Articles 8 and 25 of the American Convention, in keeping with Articles 1(1) and 2 of the same Convention, to the detriment of the alleged victims. In addition, the arguments put forth possible violations of the right to humane treatment of the alleged victims, in relation to the suffering brought on by the alleged denial of justice and because the State would not have acted to protect R.B.L. from a situation of sexual abuse; these aspects could constitute violations of the right contained in Article 5 of the Convention. In addition, if it is proven that there was lack of judicial protection in a proceeding in which sexual abuse against a girl was alleged, and that the alleged victim was not heard, it could also constitute possible violations of the rights protected in Article 19 of the Americana Convention, also to the detriment of R.B.L. In addition, in the merits stage in the instant case the IACHR will analyze whether the way in which the courts with jurisdiction acted, taken together, during the time the violations alleged are said to have taken place, is consistent with the standards of protection established in the international *corpus juris* regarding the rights of the child.

38. As for the claim of a possible violation of the rights contained in Articles 11 and 24 of the Convention, the Commission observes that the petitioner does not offer any arguments or basis for their alleged violation, accordingly it is not appropriate to find that claim admissible.

V. CONCLUSIONS

39. Based on the foregoing considerations of fact and law, the Inter-American Commission concludes that this petition satisfies the admissibility requirements established at Articles 46 and 47 of the American Convention, without prejudging on the merits.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To find this petition admissible in relation to Articles 5, 8, 19, and 25 of the American Convention, in conjunction with the obligations established at Articles 1(1) and 2 of the same instrument;
2. To find this petition inadmissible in relation to Articles 11 and 24 of the American Convention;
3. To notify the parties of this decision;
4. To continue analyzing the merits issues; and
5. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Panama, on the 6th day of the month of December, 2016. (Signed): James L. Cavallaro, President; Francisco José Eguiguren, First Vice President; Margarette May Macaulay, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, Esmeralda E. Arosemena Bernal de Troitiño and Enrique Gil Botero, Commissioners.