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REPORT No. 75/19
PETITION 246-11
REPORT ON ADMISSIBILITY

A.T.V.
ARGENTINA

Approved electronically by the Commission on May 21, 2019.

Cite as: IACHR, Report No. 75/19, Petition 246-11. Admissibility. A.T.V. Argentina. May 21, 2019.



I. INFORMATION ABOUT THE PETITION

Petitioner:	Jorge Enrique Berman
Alleged victim:	A.T.V ¹
Respondent State:	Argentina
Rights invoked:	The petition does not specify articles but in a general way invokes violations of the American Convention on Human Rights ² and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	February 28, 2011
Additional information received at the stage of initial review:	December 19, 2011
Notification of the petition to the State:	September 24, 2012
State's first response:	September 18, 2013
Additional observations from the petitioner:	December 2, 2016

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (instrument of ratification deposited on September 5, 1984); Convention of Belém do Pará (instrument of ratification deposited on July 5, 1996)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 3 (right to juridical personality), 5 (right to humane treatment), 8 (right to a fair trial), 11 (right to privacy), 24 (right to equal protection), and 25 (right to judicial protection) of the American Convention in connection with Articles 1(1) and (2) and Article 7 of the Convention of Belém do Pará
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, under the terms of Section VI in terms of exception provided in Article 46(2)(b) of the Convention
Timeliness of the petition:	Yes, under the terms of Section VI

¹ In this report, the IACHR is keeping the identity of the alleged victim confidential by using her initials. It is protecting her identity due to allegations of sexual violence and other violations against her.

² Hereinafter "the American Convention" or "the Convention."

³ Hereinafter "Convention of Belém do Pará".

⁴ The observations submitted by each party were duly transmitted to the opposing party.

V. ALLEGED FACTS

1. The petitioner asserts that A.T.V (hereinafter “the alleged victim”), a woman with a neurological disability, was a victim of rape by a neighbor and another unidentified male and that the State failed to meet its obligation to conduct an effective investigation and punish those responsible. The petitioner indicates that on the morning of October 22, 2005, Mr. F. Giurlando, a neighbor and acquaintance of the alleged victim, taking advantage of her disability, put the alleged victim in a vehicle, where he sexually abused her, and then took her to a hotel where, it was indicated, “he raped her repeatedly.” The petitioner indicates that the alleged victim was later taken to another location where a second male individual also raped her.

2. The petitioner maintains that the alleged victim was examined by a medical expert who verified the presence of semen from two adults, and that the alleged victim’s mother and guardian filed a complaint at the Police Station for Women in the locality of Martínez, in the province of Buenos Aires. The petitioner indicates that the alleged victim made a statement at that time, although she could not provide all the details, except for reporting that she had been taken to shop for plants, that she was raped, and that she was left to her fate and did not know how she got back home.

3. The petitioner reports that as a result of the complaint filed at the Police Station for Women, the Investigative Operations Unit No. 2 (Prosecutor’s Office No. 2) of the Judicial Department of San Isidro Vicente López Oeste opened a preliminary criminal investigation into sexual abuse, which went nowhere. The petitioner indicates that the prosecutor in charge of the investigation was incompetent for not having diligently investigated the allegations and for “not arresting the perpetrators of the rape.”

4. For its part, the State maintains that the petition is untimely, that the petitioner failed to exhaust domestic remedies, and that the petition does not lay out facts that would characterize a violation of the American Convention. With respect to the timeliness issue, the State indicates that the petition was lodged in 2011, even though the last judicial decision adopted in domestic jurisdiction was the May 27, 2009, judgment of Oral Criminal Court No. 3 of San Isidro. In view of that fact, the State maintains that the petition lodged on March 28, 2011, is outside the six-month time limit established under Article 46(1)(b) of the American Convention.

5. In terms of the exhaustion of domestic remedies, the State claims that once the complaint was filed, Prosecutor’s Office No. 2 of the San Isidro Judicial Department pursued a judicial investigation and brought criminal charges against Mr. Giurlando as the presumed perpetrator of the crime of sexual abuse. This criminal case was elevated to a public oral trial before Criminal Oral Court No. 3 of San Isidro, as Case No. 2347. The State reports that the mother of the alleged victim participated in the proceedings as an injured party. It indicates that the Public Prosecutor and the Official Public Defender of the man identified as the accused presented a joint agreement for summary trial, under the terms provided in Article 396 of the Criminal Procedural Code of the Province of Buenos Aires, characterizing the act of which the defendant was accused as criminal sexual abuse and seeking a punishment of three years in prison as well as the imposition of costs.

6. The State indicates that the alleged victim’s mother consented to the summary trial, which ended with the May 27, 2009, judgment cited above, as well as to the judgment by which the perpetrator of the sexual abuse was convicted, and she failed to file a cassation appeal with the Court of Cassation of the Province of Buenos Aires. Meanwhile, the annexes that the State submitted to the IACHR include the judgment of that court in which allegations related to the second individual allegedly responsible for sexual abuse and rape are discussed. The judgment indicates that due to the agreement for summary trial, the court was unable to delve into the facts or circumstances that the alleged victim had said were perpetrated by a second individual, and his existence could not be corroborated. In view of the foregoing, the State argues that the domestic remedies established in Article 46(1)(a) of the American Convention have yet to be exhausted.

7. In terms of whether the claim is colorable, the State maintains that the case over sexual abuse was carried out in line with the procedures and speed required by inter-American standards, the facts having been clarified and investigated and the perpetrator of the crime having been convicted. The State also

maintains that the alleged victim's mother had the opportunity to be heard, as she participated in the case as an injured party. The State claims that the injured party proposed various means of proof that were substantiated during the preparatory criminal investigation and that she participated in the summary trial and related proceedings. The State concludes that any party that believes he or she suffered harm due to a conviction that arose from a summary trial could have had recourse to an appeal as established in the Criminal Procedural Code.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

8. The petitioner claims that the State failed to fulfill its duty to conduct an effective investigation and punish those responsible for the rape suffered by the alleged victim. For its part, the State claims that as a result of the complaint that was filed, a judicial investigation was pursued before Prosecutor's Office No. 2 of the San Isidro Judicial Department. The State also indicates that the alleged victim's mother consented to the summary trial, which ended with the judgment of May 26, 2009, and failed to file a cassation appeal with the Court of Cassation of the Province of Buenos Aires. The State claims that since the petition was lodged on March 28, 2011, and the last judicial decision in domestic jurisdiction was in May 2009, the petition falls outside the six-month time period required in Article 46(1)(b).

9. The IACHR notes that the petitioner filed a complaint and that this led to an agreement for summary trial and the conviction of one of the individuals responsible for the purported sexual abuse of the alleged victim. The IACHR case file includes a copy of a document in which the alleged victim's mother, as an injured party, expressed her agreement with the conviction that would result from the proceeding. However, the Commission notes that in situations such as this one involving crimes against life and integrity, related to the purported rape of A.T.V., a woman with an intellectual disability, the domestic proceeding that must be exhausted is the criminal investigation, in order to identify and punish all those allegedly responsible. In this proceeding, it is the State that must pursue the investigation with thoroughness and due diligence.⁵

10. The Inter-American human rights system has established that there are certain groups in a vulnerable situation, including women and people with disabilities, whose vulnerability affects their guarantees of access to justice and due process. In the case of women, the inter-American system has identified multiple barriers they face in obtaining access to justice on an equal basis and without discrimination, particularly in cases involving sexual violence. In investigating and prosecuting cases related to the rape of individuals in an especially vulnerable situation, the State must ensure that the alleged victim has full access and is able to participate, and should provide her the means to have access to and participate in the proceedings of the case. In the matter at hand, the petitioner alleges that the investigation was hampered by omissions, which was reflected in the failure to investigate the complaint related to a second person responsible for the rape of A.T.V.

11. In this case, the alleged lack of due diligence in the judicial proceedings and the failure to treat the alleged victim as an interlocutor during the merits stage of the case, based on apparent double discrimination due to her gender and her intellectual disability, as well as the purported actions designed to discourage complaints by means of an agreement for summary trial that did not allow for a full investigation into the allegations, all add up to sufficient elements to consider that the exception provided in Article 46(2)(b) of the Convention applies.

12. In terms of the timeliness issue, the Commission concludes that, because this case falls under the exception mentioned above, the petition has been lodged within a reasonable time period, based on Article 32(2) of its Rules of Procedure. This last determination stems from the fact that while the various crimes committed against A.T.V were apparently committed beginning on October 22, 2005, the alleged victim has reportedly yet to obtain justice.

⁵ IACHR. Report No. 154/10, Petition 1462-07. Admissibility. Linda Loaiza López Soto and Next of Kin. Venezuela. November 1, 2010, para. 49; IACHR. Report No. 22/09, Petition 908-04. Admissibility. Igmarr Alexander Landaeta Mejías. Venezuela. March 20, 2009; I/A Court H.R. Case of Velásquez Rodríguez. Judgment of July 29, 1988. Serie C No. 4, para. 63.

VII. ANALYSIS OF COLORABLE CLAIM

13. In view of the elements of fact and law laid out by the parties and the nature of the matter before it, the Commission finds that if the facts recounted in this position are proved, they could constitute violations of rights protected in Articles 3 (right to juridical personality), 5 (right to humane treatment), 8 (right to a fair trial), 11 (right to privacy), 24 (right to equal protection), and 25 (right to judicial protection) of the American Convention in connection with Article 1(1) and 2 thereof and with Article 7 of the Convention of Belém do Pará.

14. In addition, during the merits stage of this petition the Commission will examine whether the domestic legal proceedings complied with guarantees of due process and judicial protection and provided due guarantees of access to justice so that the alleged victim could be heard, under the terms of the American Convention. Specifically, the Commission will analyze the State's possible failure to comply with the obligations established in Article 2 of the American Convention regarding whether the Argentine legal framework related to summary criminal proceedings is suitable to safeguard the rights of alleged victims in cases involving the crime of rape, given the petitioner's allegation that the acts suffered by A.T.V have gone unpunished. The IACHR observes that the consent of the alleged victim's mother to the summary trial that ended with the judgment of May 27, 2009, which resulted in the conviction of only one of the men responsible, meant that due to the nature of the summary trial, the court was prevented from delving deeper into the acts or circumstances mentioned by the alleged victim that were perpetrated by a second individual.

VIII. DECISION

1. To declare this petition admissible in relation to Articles 3, 5, 8, 11, 24, and 25 of the American Convention in connection with Articles 1(1) and 2 thereof and Article 7 of the Convention of Belém do Pará;

2. To notify the parties of this decision; continue with the analysis on the merits of the matter; and publish this decision and include it in the Commission's Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 21ST day of the month of May, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Francisco José Eguiguren Praeli, Luis Ernesto Vargas Silva, and Flávia Piovesan, Commissioners.