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REPORT No. 33/18

PETITION 377-08

REPORT ON ADMISSIBILITY

AMANDA GRACIELA ENCAJE AND FAMILY
ARGENTINA

Approved by the Commission at its session No. 2125 held on May 4, 2018.
168th Special Period of Sessions.

Cite as: IACHR, Report No. 33/18. Admissibility. Amanda Graciela Encaje and family.
Argentina. May 4, 2018.



I. INFORMATION ABOUT THE PETITION

Petitioner:	Silvia Elena Encaje and Andrea Valeria Martínez
Alleged victim:	Amanda Graciela Encaje and family
Respondent State:	Argentina
Rights invoked:	Does not specify alleged articles

II. PROCEEDINGS BEFORE THE IACHR¹

Filing of the petition:	March 29, 2008
Notification of the petition to the State:	May 6, 2014
State's first response:	October 6, 2015

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 on Human Rights ² (instrument deposited on September 5, 1984) and Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women ³ (instrument 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 4 (life), 5 (humane treatment), 8 (a fair trial), 11 (privacy), 24 (equal protection), and 25 (judicial protection) of the American Convention in conjunction with Article 1.1 thereof and Article 7 of the Convention of Belém do Pará
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes. Article 46.2.b of the Convention applies
Timeliness of the petition:	Yes, as referred to in Section VI

V. ALLEGED FACTS

1. The petitioners state that the alleged victim, Amanda Graciela Encaje, was murdered on April 8, 1992, inside facilities belonging to the Supercemento S.A. Company, where she was a secretary, located in Resistencia, in the Province of Chaco, Argentina. They say that her body was found next to that of Néstor Blas Vivo, a director of that company. They assert that both had been beaten and tortured and that one of the autopsies carried out on the alleged victim indicated that she had been raped. They allege that a large sum of money corresponding to part of their wages was found near the bodies, suggesting that the assaults were not related to a robbery. They say that company operatives notified the police hours after they had found the bodies and after having reported the deaths at various levels of the hierarchy, thereby delaying the complaint.

¹ The observations submitted by each party were duly transmitted to the opposing party.

² Hereinafter, "American Convention" or "Convention".

³ Hereinafter, "Convention of Belém do Pará".

2. They argue that the murder of the alleged victim occurred in a context "in which a message or ultimatum was being conveyed to other executives in the firm" about the consequences of failing to pay bribes, bearing in mind that the company had been awarded a major road construction concession in the city of Resistencia as a participant in a road transportation consortium called VICOVSA, previously associated with acts of corruption. They further claim that the facts of the case have to be seen in the context of unlawful and corrupt acts committed in order to obtain contracts and that was why the enterprise in question disappeared five months after the murders. They add that, inexplicably, several lawyers asked to represent the plaintiffs in this case expressed disinterest in doing so.

3. They point out that complaints had been lodged with the Higher Court of Justice in the Province, with former President Néstor Kirchner, the Minister of the Interior, the Minister of Justice, the Governor of Chaco Province, the Human Rights Commission of the Provincial Chamber of Deputies, and that of the Provincial Executive Branch, as well as other authorities. They say that the Eighth District Police Station in the City of Resistencia intervened and *ex officio* criminal proceedings were initiated before the 5th court of first instance of the Province of Chaco.

4. Regarding the proceedings, the petitioners complain of a series of irregularities committed in the investigation, including the fact that the first judge handling the case recused himself without justification; failure to provide custody of the crime scene, which, they say, allowed people to pass through the unprotected crime scene and take away evidence with the consent of the police and judicial authorities present; the fact that within 15 days of the crime the scene was painted and renovated; delays in searching the company; contradictory autopsies, with nothing having been done to explain the discrepancies, especially as regards the possible rape of the victim; the loss of the vaginal samples taken from the alleged victim; the leaking of key information for the case to the media by state agents, including, for instance police statements disseminated in the media before the judiciary had been notified, which allegedly had made witnesses afraid to make judicial declarations; and the murder of one of the police officers assigned to the investigation.

5. They also allege that the line of investigation pursued focused on the personal lives of the victims, to no avail, and that other lines of investigation were not properly pursued. They specify that a highly regarded engineer publicly stated that the then Minister of Public Works and Public Services, the Secretary of that portfolio and executives of the company were instigators of the crime and/or accessories after the fact and that there had been a settling of scores due to failure to pay bribes. They point out that those statements were later rectified in court, probably out of fear and for lack of guarantees.

6. The petitioners alleged, when lodging their petition with the Commission, that 15 years after the facts the case was still at the pre-trial stage, which meant there was imminent risk of it prescribing due to the statute of limitations, which would result in impunity. They add that when the complaint was filed they were not formally notified that the case had been closed but had heard as much from media reports of statements made by the judge in the case. They argue that the lack of investigation and alleged irregularities committed with respect to it occurred due to the close ties between economic and political circles in the Province, which prevented light being thrown on the facts of the case. They allege that those facts denote "a crime with clearly mafia-like connotations" in the context of an investigation that they allege was "plagued with omissions, irregularities, cover-up, and pre-meditated corruption by judicial and police officers. Consequently the case ends up being closed due to prescription given the lack of accused and evidence."

7. The State, for its part, claims that notification of the petition was extemporaneous, because it was lodged in April 2008 and the State was notified almost six years later. It asks that, on those grounds, "the current proceedings be archived." In addition, and alternatively, it requests that the petition be declared inadmissible. It maintains that the petitioners did not exhaust domestic remedies because they did not challenge the decisions taken in the course of the criminal proceeding initiated because of the death of the alleged victim. It points out that, starting in 2004, criminal proceedings in the province shifted to the adversarial system, as a result of which the preliminary investigation is conducted by public prosecutors whose decisions are reviewed by judges responsible for procedural safeguards. The State claims that, despite that, the petitioners did not file any complaint regarding the acts of corruption or cover-ups they allege in their statements to the Commission.

8. It argues that the petitioners made no use of the "private plaintiff" provision incorporated into the rules governing criminal proceedings in the Province of Chaco in 1999. According to the State, this provision provides for not only showing proof of criminal conduct and of criminal liability, but also for autonomously appealing against the archiving or dismissal of the case or against a judgment of acquittal. The State adds that Law No. 55875 provided that exercising the powers bestowed on a private plaintiff may be done with the sponsorship of an official public defense counsel (*Defensor Oficial*). It argues that if use had been made of those powers, family members would have been able to participate in the proceedings with the aforementioned possibilities and they could have voiced in domestic proceedings the same questioning of the investigation that they have now conveyed to the Commission.

9. At the same time, the State points out that the arguments of the petitioners do not point to facts characterizing a violation of the rights of the alleged victims recognized in the American Convention pursuant to Articles 47.b and 34.a of the Commission's Rules of Procedure. It argues that the criminal investigation and subsequent judgment of March 11, 2014, which declared the total and definitive dismissal of the case in respect of two people, because they had died, and in respect of six people due to prescription, while declaring the termination of the right to bring a criminal action, was in accordance with due process by international legal standards. It claims that the petitioners had merely voiced their disagreement with the findings of fact and law reached by domestic courts and had resorted to the Commission as a court of "fourth instance."

10. It asserts, as regards the allegations, that the judge handling the case went to the offices of the company the day after the facts of the case and that the authorities were cognizant of what had happened one hour and fifty minutes after the discovery of the bodies, and that, as a result of the on-site inspection, documents found on the desks of the deceased had been seized. The State maintains that based on the records collected several lines of investigation were pursued, some of which had to do with the private life of the alleged victim. It states that the vaginal samples taken from the alleged victim did not get lost, they can be found in file on the proceedings, and that tests findings were negative as to the presence of semen. It claims that despite some differences between the experts' reports both agree that the cause of death was homicide. In addition, the State says, regarding the different versions of public statements by a witness in respect of his declaration to the judicial authorities, that that person had come forward to explain that what had been stated publicly was conjecture, some of which he denied saying and which he attributes to journalistic distortions.

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

11. The petitioning party states that when the petition was lodged criminal proceedings were still under way and the archiving of the case was imminent due to the time that had elapsed. For its part, the State points out that on March 11, 2014, the Fifth Court of First Instance handed down judgment declaring that the case had been totally and definitively dismissed in respect of eight persons. It further argues failure to exhaust domestic remedies because the family of the alleged victim did not challenge the decisions taken in the course of the criminal proceedings initiated as a result of the death of the alleged victim. Nor did it file complaints about the alleged irregularities and violations of due process it reported to the Commission.

12. The Commission reiterates that under procedural rules in which victims or their family members may have the right to intervene in criminal proceedings, the exercise of that possibility is not mandatory but optional and in no way substitutes for actions to be taken by the State, because whenever a crime is committed that must be prosecuted *ex officio*, such as homicide, it is the State that is obliged to promote and advance the criminal proceedings. In those cases, such action constitutes a befitting way to throw light on the facts of the case, try those responsible, and establish the corresponding criminal sanctions.⁴ In the instant case, after having, *ex officio*, brought a criminal action to investigate the facts and

⁴ IACHR, Report No. 31/15, Case 10.522. Admissibility Juan Fernando Porras Martínez. Colombia. July 22, 2015, paras 25 and 36.

determine responsibilities, 20 years after the facts, the case was dismissed definitively without having established the criminal responsibility of the perpetrators. From the above, it transpires that the violent death was denounced and investigated, allegedly deficiently, and, *prima facie*, the Commission considers that the petitioners have argued alleged impediments to the possibility of exhausting domestic remedies. Therefore, given the nature of the facts reported, the Commission considers that the exception to exhaustion provided for in Article 46.2.b of the American Convention is applicable in the instant case, so that the arguments can be analyzed at the merits stage.

13. In addition, the Commission notes that the petition was received on March 29, 2008 and that the alleged facts referred to in it are said to have occurred on April 8, 1992, with the effects of the alleged denial of justice continuing to this day. Therefore, in light of the context and characteristics of this case, the Commission considers that the petition was lodged within a reasonable time and that the admissibility requirement regarding the timeliness of its presentation must be deemed met.

14. At the same time, the Inter-American Commission takes note of the State's objection that notification of the petition was extemporaneous. The IACHR points out in this regard that neither the American Convention nor the Rules of Procedure of the Commission establish a deadline for notifying a State of a petition, measured from the time it was received, and that the times allowed in the Rules of Procedure and in the Convention for other processing stages are not applicable by analogy.⁵

VII. ANALYSIS OF COLORABLE CLAIM

15. Taking into account the factual and legal arguments presented by the parties and the nature of the matter before it, the Commission finds that, if proven, the alleged facts relating to violations of due process, unwarranted delay, and failure to investigate and punish those allegedly responsible, as well as the alleged impunity in respect of acts of physical abuse, rape, and murder of the alleged victim, could characterize possible violations of rights protected in Articles 4 (life), 5 (humane treatment/personal integrity), 8 (judicial guarantees), 11 (protection of honor and dignity), 24 (equal protection before the law), and 25 (judicial protection) of the American Convention, taken in conjunction with Articles 1(1) thereof and Article 7 of the Convention of Belem do Pará. Likewise, the facts described could characterize possible violation of Article 8 (judicial guarantees) and Article 25 (judicial protection) of the American Convention to the detriment of the family members of the alleged victim.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 4, 5, 8, 11, 24, and 25 of the American Convention, pursuant to Article 1.1 thereof and Article 7 of the Convention of Belem do Pará; and

2. To notify the parties of this decision; to continue with the analysis on the merits; and 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 Santo Domingo, Dominican Republic, on the 4th day of the month of May, 2018. (Signed): Margarette May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, Antonia Urrejola, and Flávia Piovesan, Commissioners.

⁵IACHR Report No. 20/17. Admissibility. Rodolfo David Piñeyro Ríos. Argentina. March 12, 2017, para. 8; IACHR Report No. 56/16. Petition 666-03. Admissibility. Luis Alberto Leiva Argentina. December 6, 2016, para. 29