

OEA/Ser.L/V/II.
Doc. 139
27 April 2020
Original: Spanish

REPORT No. 129/20
PETITION 1714-07
ADMISSIBILITY REPORT

NERINA CLAUDIA POJMAEVICH
ARGENTINA

Electronically approved by the Commission on April 27, 2020.

Cite as: IACHR Report No. 129/20. Petition 1714-07. Admissibility. Nerina Claudia Pojmaevich. Argentina. April 27, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Josefina Margaroli and Sergio Luis Maculan
Alleged victim:	Nerina Claudia Pojmaevich
Respondent State:	Argentina
Rights invoked:	Article 5 (humane treatment), 8 (fair trial), 10 (compensation), 11 (honor and dignity), 21 (private property), and 25 (judicial protection) of the American Convention on Human Rights, ¹ in conjunction with its articles 1 (duty to respect rights) and 2 (duty to adopt domestic legal effects); article 2 (forms of violence against women), 3 (life free from violence), 4 (rights of women), 7 (duty of States), and 8 (duty to adopt domestic legal effects) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women; ² articles I (life, liberty, security, and the security of person), II (equality before the law), V (honor, reputation, and private and family life), XIV (work and fair remuneration), XVII (recognition of juridical personality and civil rights), XVIII (justice), XXIII (property), and XXIV (petition) of the American Declaration of the Rights and Duties of Man; ³ and other international instruments ⁴

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition:	August 27, 2007.
Additional information received at the phase of initial review:	March 10, June 2, and December 19, 2008; May 13, 2013; January 6, 2014; February 19, 2016
Notification of the petition to the State:	June 14, 2016
State's first response:	July 31, 2017
Additional observations from the petitioner:	October 10, 2017; June 14, 2018; and December 20, 2018
Additional observations from the State:	January 22, 2019.

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 (ratification instrument deposited on September 5, 1984); and Convention of Belém do Pará (ratification 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:	Article 8 (fair trial), 21 (private property), and 25 (judicial protection) of the American Convention, in conjunction with its articles 1(1) (duty to respect rights), 2 (duty to adopt domestic legal effects), 5 (humane treatment), and 11 (honor and dignity); and Article 7 of the Convention of Belém do Pará.

¹ Hereinafter "the American Convention" or "the Convention."

² Hereinafter the "Convention of Belém do Pará."

³ Hereinafter "the American Declaration" or "the Declaration."

⁴ Articles 1 and 14 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Punishment or Treatment; articles 1, 2, 3, 5, 7, and 17 of the Universal Declaration of Human Rights.

⁵ The observations presented by each party were duly transmitted to the opposing party.

Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, pursuant to the terms of Section VI
Timeliness of the petition:	Yes, pursuant to the terms of Section VI

V. ALLEGED FACTS

1. Josefina Margaroli and Sergio Luis Maculan (hereinafter "the petitioners") allege violations of the human rights of Nerina Claudia Pojmaevich (hereinafter "the alleged victim"), claiming that she was unjustly dismissed and the victim of sexual abuse and harassment, as well as labor, moral, and psychological harassment at her workplace, the Argentina office of the United Nations Children's Fund (hereinafter "UNICEF Argentina"). They allege that even though she obtained judicial rulings granting her compensation for the harm she suffered, they have not been made effective because of the immunity from execution that the State has granted to UNICEF, resulting in a denial of justice that has prolonged the alleged victim's suffering. They also allege that the State did not provide effective protection from harassment to individuals working in the private sector, and that it does not offer adequate opportunities for private parties to take part in defending their rights during administrative processes to address illegal behavior by public officials.

2. The petitioner indicates that on October 20, 2005, a labor suit was filed before the National Labor Trial Court on behalf of the alleged victim against UNICEF Argentina and the company TERCERIZACIÓN RH S.A., seeking recognition that she had been the victim of harassment and abuse in her working environment and the granting of compensation for, *inter alia*, her unjustified dismissal. In April 2011, the court issued a judgment convicting both codefendants. The judgment recognized that the dismissal had been unjustified and ordered compensation for it. However, it did not make any determinations regarding the alleged sexual abuse and sexual, workplace, moral, and psychological harassment in her working environment, concluding that these issues were the subject of a civil action that was in process before National Civil Trial Court No. 75. The alleged victim appealed the judgment. Her appeal was rejected, with the court finding that in her suit, the alleged victim had not requested compensation for the harassment and abuse and had indicated that she would seek damages civilly for the harm suffered from the harassment. This decision was appealed through an extraordinary federal remedy and, following its rejection, through a motion for reconsideration of dismissal of appeal. Finally, on November 6, 2012, the Supreme Court of Justice of the Nation denied the motion for reconsideration of dismissal of appeal, exhausting the labor courts.

3. According to the petitioners, the alleged victim requested that a UNICEF Argentina account be seized in order to ensure compliance with the judgment handed down against the organization; however, on March 11, 2013, the labor court denied this measure, finding that the organization was protected by immunity from execution. In response, and in view of the insolvency of the codefendant private company, the petitioner states that the alleged victim has not been able to collect on the compensation awarded for the unjustified dismissal and argued that the State must be held responsible for paying it because it had granted immunity to UNICEF.

4. The petitioner also states that, in the framework of the labor proceeding, the trial court judge illegally extended the deadline for response and did not hold UNICEF in contempt, as required by law. The alleged victim therefore filed suit against her before the Council of the Magistrature (hereinafter the "CNM") and the Office of the Public Prosecutor. The petitioner argues that the administrative process carried out did not provide due process guarantees. It indicates that the alleged victim and her representatives were prevented by law from being a party to that process and were not able to access the case file. The petitioners also add that they were not able to appeal the CNM decision dismissing the suit and closing the file on the process, as the law only allows for review of CNM decisions that apply a disciplinary sanction. They argue that the State violates due process and equal protection by failing to provide for a remedy for the complainant in the event of acquittal, whereas those who receive penalties are offered the chance to appeal.

5. They also report that a criminal process was launched against the judge for breach of legal duty, in which the alleged victim and her representatives were prevented from taking part as complainants. In response to the filing of an appeal for reversal, in December 2006, the trial court dismissed it and allowed the

alleged victim to act as complainant. The alleged victim appealed the ruling to dismiss, but it was upheld by a higher court in May 2007. A cassation appeal was filed in response, which was denied in November 2007. A motion for reconsideration of dismissal of appeal was filed in response, which was rejected in November 2007.

6. The petitioners also filed a suit for damages against UNICEF and the officials that had harassed her, the company TERCERIZACIÓN RH S.A., and the National State seeking compensation for the sexual harassment and abuse and the workplace moral and psychological harassment suffered by the alleged victim. They state that on September 16, 2014, the trial court found that the harm resulting from the sexual harassment had been substantiated and ordered UNICEF to provide compensation to the alleged victim for pecuniary, nonpecuniary, and psychological damages. The alleged victim appealed this decision, arguing that the National State should have also been required to pay compensation, as it had granted immunity to UNICEF, and indicates that this remedy has not yet been reviewed by the appeals court.

7. According to the petitioners, the fact that it was impossible to punish the sexual harassment and abuse and the moral and psychological harassment suffered by the alleged victim, as well as well as impossible to collect the compensation that had been awarded, violates her human rights. They also state that the sexual abuse and harassment has had an impact on her integrity of person and her honor and dignity, and that the fact that it was impossible to execute the judgments handed down in her favor perpetuates the harm. They also allege that Argentine legislation is discriminatory because the type of workplace harassment known as “mobbing” has only been codified for public employees and only in certain jurisdictions. This leaves individuals like the alleged victim who work in the private sector unprotected. They allege that the failure to codify “mobbing” forces those working in the private sector to report this practice under categories that are inadequate, such as workplace defamation—which is difficult to prove—or, in the case of the alleged victim, through lawsuits for damages in civil court.

8. For its part, the State argues that the petition should be declared inadmissible for failure to exhaust internal remedies or incomplete exhaustion of remedies, as well as a lack of a colorable claim to violations of the alleged victim’s human rights. It indicates that in the labor courts, the petitioners failed to comply with the procedural requirement of independently providing grounds for the motion for reconsideration of dismissal of appeal filed before the Supreme Court of Justice of the Nation, thus preventing the State from properly addressing the harms alleged internationally. In addition, it underscores that the lawsuit for damages filed in civil court is still in process.

9. As regards the lack of a colorable claim, it states that the failure of the labor proceeding to recognize sexual abuse and harassment and workplace, moral, and psychological harassment does not constitute a violation of the alleged victim’s rights, as compensation had not been requested for these alleged facts in that process. It also adds that the failure of the law providing protection from mobbing to extend that protection to workers outside the public sector was not evidence of a violation of the alleged victim’s rights, as in this case, it had not prevented these issues from being addressed in civil court. The State also notes that the civil courts have not determined whether UNICEF Argentina has diplomatic immunity.

10. The State argues that the alleged victim has been able to exercise her rights in multiple judicial and administrative instances, and the fact that she has received unfavorable responses is not in itself a violation of human rights. It states that during the processing of the various legal cases, the rights to due process and a fair trial—including the real possibility of accessing all the appeals mechanisms provided for by law—have been respected in every court involved. It concludes that the alleged victim has turned to the IACHR as a fourth instance because she disagreed with the decisions of judicial authorities. It argues that additionally, processing of this petition by the IACHR was untimely, as notification of it was issued eight years after it was received.

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

11. As regards the labor proceeding, as indicated by the State, the motion for reconsideration of dismissal of appeal filed before the Supreme Court of Justice of the Nation was dismissed for failing to comply with the procedural requirement of independently providing grounds. However, the IACHR recalls that the

motion for reconsideration of dismissal of appeal is limited and the scope of its merits narrow,⁶ and the requirement to exhaust domestic remedies has the purpose of allowing the domestic authorities to take cognizance of the alleged violation of a protected right and, if appropriate, resolve the situation before it is taken up by an international body.⁷ In this regard, the IACHR observes that in the appeal, the extraordinary federal remedy, and the motion for reconsideration of dismissal of appeal, the alleged victim indicated that the failure to recognize the sexual harassment and abuse and the labor and moral harassment in the workplace, as well as the impossibility of executing a judgment because of UNICEF's diplomatic immunity and the insolvency of the codefendant, generated State responsibility for the violation of her human rights. Also, following the judgment of the Supreme Court of Justice of the Nation, the alleged victim requested that a UNICEF account be seized, a request that was denied on March 11, 2013, on the grounds that UNICEF was protected by immunity from execution. Therefore, the IACHR finds that the alleged victim has brought the situation and the alleged violation of her human rights to the awareness of State authorities on multiple occasions and, given that the decision handed down in the labor process could not be executed, the IACHR finds that the exception set forth in Article 46(2)(c) of the American Convention applies on this point. In this regard, and as argued by the petitioner, the Commission also observes that the legal obstacles claimed to exist to the alleged victim's ability to secure compensation from UNICEF Argentina are conditions set by the State itself. Likewise, in view of the fact that the labor process was started in 2005, with this matter being submitted before the IACHR in 2008 and the situation persisting to the present day, the Commission finds that this aspect of the petition also complies with the requirement of Article 32(2) of the Rules of Procedure of the IACHR.

12. Additionally, as regards the lawsuit for damages, the IACHR observes that it was filed in 2006, and that according to the information provided by both parties, it has not yet concluded, with analysis of an appeal filed in 2014 remaining pending. In view of this, the IACHR finds that the exception set forth in Article 46(2)(c) of the Convention applies to this case; and that the petition also complies with the requirements set forth in Article 32(2) of the Rules of Procedure of the IACHR applicable to this point.

13. The Commission takes note of the State's claim as to what it describes or classifies as untimeliness in the forwarding of the petition, but recalls that neither the American Convention nor the Rules of Procedure of the Commission establish a deadline for forwarding a petition to a State after it is received, and that the deadlines established in the Rules of Procedure and in the Convention for other stages of the process are not applicable by analogy.⁸

VII. ANALYSIS OF COLORABLE CLAIM

14. The Commission observes that this petition includes allegations to the effect that the State has not provided effective mechanisms that would enable the alleged victim to secure punishment and reparation for the harm caused by the harassment and abuse of which she was the victim.

15. In view of these considerations, and upon examination of the elements of fact and law set forth by the parties, the Commission concludes that the petitioners' allegations are not manifestly groundless and must be examined on their merits, as should the facts alleged be found to be true, they could represent violations of articles 8 (fair trial), 21 (private property), and 25 (judicial protection) of the American Convention in conjunction with its articles 1(1) (duty to respect rights), 2 (duty to adopt domestic legal effects), 5 (humane treatment), and 11 (honor and dignity); as well as Article 7 of the Convention of Belém do Pará.

16. As regards the alleged violations of Article 10 (compensation) of the American Convention, the Commission concludes that the petitioner has not provided evidence or support allowing for the *prima facie* conclusion that they were possibly violated.

⁶ IACHR Report No. IACHR, Report No. 69/08, Petition 681-00. Admissibility. Guillermo Patricio Lynn. Argentina. October 16, 2008, para. 43.

⁷ IACHR Report No. 82/17. Petition 1067-07. Admissibility. Rosa Ángela Martino and María Cristina González. Argentina. July 7, 2017, para. 12.

⁸ IACHR Report No. 34/18. Admissibility. Guillermo Juan Tiscornia and Family. Argentina. May 4, 2018, para. 20.

17. As regards the alleged violations of article 2, 3, 4, and 8 of the Convention of Belém do Pará, the IACHR notes that, in accordance with Article 12 of that treaty, the Commission's *ratione materiae* competence to find violations of it in the context of an individual case is limited to its Article 7. The IACHR also notes that it lacks *ratione materiae* competence to address the alleged violations of the Universal Declaration of Human Rights and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment. However, pursuant to Article 29 of the American Convention, the Commission may address and take into account the aforementioned treaties and articles during the merits stage as part of its exercise of interpreting the provisions of the American Convention and other applicable instruments.

18. Regarding the alleged violations of the rights protected by the American Declaration, the Inter-American Commission has previously established that once the American Convention enters into force for a State, it is the Convention, not the Declaration, that becomes the primary source of a right applicable by the Commission, as long as the petition refers to the alleged violation of rights that are identical in both instruments and does not involve a situation of an ongoing violation.

VIII. DECISION

1. To find the instant petition admissible in relation to articles 8, 21, and 25 of the American Convention, in relation to articles 1(1), 2, 5, and 11 of the American Convention; and in relation to Article 7 of the Convention of Belém do Pará;

2. To find the instant petition inadmissible in relation to Article 10 of the American Convention;

3. To notify the parties of this decision; continue with analysis of the merits of the matter; and publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 27th day of the month of April, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Julissa Mantilla Falcón, and Stuardo Ralón Orellana, Commissioners.