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Report No. 68/20
PETITION 417-10
REPORT ON ADMISSIBILITY

JONATHAN OROS AND FAMILY
ARGENTINA

Approved by the Commission electronically on April 24, 2020.

Cite as: IACHR, Report No. 68/20, Petition 417-10. Admissibility. Jonathan Oros and family. Argentina. April 24, 2020.



I. INFORMATION ABOUT THE PETITION

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| Petitioner: | Asociación para la promoción y protección de los derechos humanos (Xumek) |
| Alleged victims: | Jonathan Oros and Raúl Oros |
| Respondent State: | Argentina |
| Rights invoked: | Articles 4 (life), 5 (humane treatment), 8 (fair trial), 19 (rights of the child), and 25 (judicial protection) of the American Convention on Human Rights ¹ , in relation to its Articles 1(1) (obligation to respect rights) and 2 (domestic legal effects) |

II. PROCEEDINGS BEFORE THE IACHR²

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| Filing of the petition: | March 23, 2010 |
| Notification of the petition to the State: | May 4, 2016 |
| State's first response: | July 28, 2017 |
| Additional observations from the petitioner: | October 2, 2017 |

III. COMPETENCE

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| 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 September 5, 1984) |

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

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| Duplication of procedures and international <i>res judicata</i>: | No |
| Rights declared admissible | Articles 4 (life), 5 (humane treatment), 8 (fair trial), 13 (freedom of expression), and 25 (judicial protection) of the American Convention, in relation to its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects). |
| Exhaustion of domestic remedies or applicability of an exception to the rule: | Yes, on September 4, 2009 |
| Timeliness of the petition: | Yes, in the terms of Section VI |

V. FACTS ALLEGED

1. The petition asks the IACHR to declare the State of Argentina internationally responsible for violating the rights to life and personal integrity of youth Jonathan Oros, and for violating the fair trial guarantees and the right to judicial protection of his family, in particular of his father, Raúl Oros.

2. According to the petition, on January 7, 2007, in unclear circumstances, youth Jonathan Oros, who was 19 years old, was shot three times by agents of the Mendoza Police – Section 33, which caused his death two days later at the Lagomaggiore Hospital. The criminal justice authorities considered it proven that

¹ Hereinafter “the American Convention” or “the Convention.”

² The observations submitted by each party were duly transmitted to the opposing party.

the youth had entered the police station armed with a pistol, threatening to kill the agents who were there; but the petitioners hold that, according to other versions presented by eyewitnesses, the shooting of Jonathan was allegedly preceded by a physical altercation involving the alleged victim and a police agent outside the police station, and Jonathan at no time entered the police station wielding a weapon. Petitioner states that after Jonathan received the third shot he was brought into the station by police agents, where he was kept behind closed doors until an ambulance came a few minutes later and took him to the hospital. The petitioner holds that the autopsy revealed that Jonathan's corpse had lesions which would indicate that before his death he received several blows, in addition to the firearm shots.

3. It is alleged that Jonathan's family members were victims of mistreatment, failure to provide complete information, and temporary denial of access to Jonathan at the Hospital Lagomaggiore on the day he was hospitalized, both by hospital staff and by the numerous police agents who were guarding the wounded youth. Some of those police agents were said to have displayed a violent attitude towards Jonathan's father, even threatening to kill him if he didn't "stay still." That day Jonathan's father went to Section 33 of the Police and filed therein a criminal complaint regarding the events with the judicial agents who were present there. The death threats against Jonathan's father were allegedly repeated in the early morning hours of the next day, when face-covered persons approached him on the street and warned him in violent and rude terms not to take any action. Finally, after Jonathan died on January 9, 2007, the family members were allowed into the hospital room where his lifeless body lay, still being guarded by numerous police agents.

4. An investigation was immediately initiated against the police agent who shot Jonathan, undertaken by the Prosecutor of Complex Crimes of Mendoza; it was ordered that he be held in pretrial detention. Subsequently he was subjected to a criminal trial before the 7th Criminal Chamber of Mendoza. According to the petitioners, in the investigation the police agents initially testified in favor of the police agent under investigation, "*but soon thereafter a report by the Inspector General for Security refuted the official version and began to uncover a network of coverups regarding the death of the young man which led to five police agents being placed on leave.*" The Criminal Chamber, in a judgment of June 18, 2008, convicted agent Vaca as the perpetrator of the crime of homicide by excess in legitimate self-defense, and imposed a penalty of four years in prison and eight years of special disqualification. The defense counsel for the convicted officer filed a certiorari appeal against this judgment before the Supreme Court of Justice of Mendoza, which overturned the judgment and acquitted the accused in a decision of October 29, 2008. Jonathan's next-of-kin filed a federal extraordinary appeal (*recurso extraordinario federal*) against this decision, seeking to have the judgment reviewed by the Supreme Court of Justice of the Nation, yet the appeal was rejected by the Supreme Court of Mendoza on March 17, 2009. A complaint appeal (*recurso de queja*) was filed against this rejection before the Supreme Court of Justice of the Nation, which in turn rejected it by decision of September 1, 2009, notified on September 4, 2009.

5. According to the petitioner, the judgment of the Supreme Court of Justice of Mendoza that acquitted agent Vaca allegedly modified the facts that the Criminal Court had established; the petitioner indicates that this was done without hearing the witnesses, producing new evidence, or guaranteeing the right to defense of the victim's next-of-kin. They also allege that on adopting this judgment the Supreme Court exceeded the limits of the certiorari motion, given that it proceeded to determine evidence appreciation matters without having immediate access to the testimony, statements, and other evidence that led the judges below to form their certainty regarding the defendant's guilt. They argue that "*the accused was acquitted in this manner without the accuser having been heard in an adversarial procedure.*" Accordingly, they argue that the judgment of acquittal on appeal violated the fair trial guarantees established in Article 8 of the American Convention, including the right to re-interrogate witnesses and discuss the evidence in the file. The petitioner also questions the impartiality of the Supreme Court of Justice of Mendoza, asserting that it changed the facts of the case which had already been proven before the Criminal Chamber, and that in doing so it attributed to Jonathan a conduct that had not been proven, i.e. having entered the Police station supposedly brandishing a firearm and threatening the agents present therein.

6. The petitioner considers that the death of the alleged victim is part of a broader pattern of extrajudicial executions by the Police of Mendoza and other provinces of Argentina, that have supposedly been committed during operations to maintain public order and fight crime. In this regard they cite a high number

of cases of deaths of citizens, including several youths, caused by gunshot wounds inflicted by Police agents from 1998 to 2010, as a result of an “easy trigger” policy.

7. The State, for its part, alleges that available domestic remedies were not properly exhausted, since the complaint appeal filed by the petitioner and decided by the Supreme Court of Justice of the Nation on September 1, 2009 was denied on formal grounds. In addition, it argues that the petition was filed in an untimely manner since more than six months elapsed between September 4, 2009, the date of notification of the last decision by the Supreme Court of Justice, and the filing of the petition before the IACHR, which received the brief on March 23, 2010.

8. It also alleges that the petitioner does not describe facts entailing possible violations of human rights, thus incurring in a lack of characterization that would render the petition inadmissible pursuant to Article 47(b) of the American Convention.

9. Finally, Argentina argues that the forwarding of the petition by the Commission was untimely, and states that it gives rise to a “serious issue” (“grave problemática”), though it does not describe what this issue is.

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

10. In the first place the Inter-American Commission takes note of the State’s complaint over what it describes or qualifies as an untimely forwarding of the petition. Yet the Commission recalls, as it has done consistently, that neither the Convention nor the Commission’s Rules of Procedure establish a time limit for forwarding a petition to the State from the moment of its reception, and that the time limits established in the Rules of Procedure and the Convention for other stages of the procedure are not applicable by analogy.

11. With regard to the exhaustion of domestic remedies, the State argues that the extraordinary complaint appeal (*recurso de queja*) was filed without meeting certain formal requirements, which resulted in it being denied by the Supreme Court. Nonetheless, it does not explain what those formalities were, merely transcribing the section of the Court’s decision that invokes the provisions considered as breached, without describing the content of those provisions nor the reasons why the Court considered them not to be fulfilled, or the way in which they were applied in the specific case to deny the complaint. In this connection, the petitioner argues that said extraordinary appeal was duly presented, and that the Supreme Court of Justice of the Nation denied it on purely formalistic grounds so as to avoid ruling on the merits of the matter, which went to the alleged violation of the victims’ human rights.

12. Regarding extraordinary remedies, the Inter-American Commission has established that “whenever the petitioner considers that these may have a favorable outcome in remedying the situation and he or she chooses to pursue them, such remedies must be exhausted in accordance with procedural rules in force, provided that conditions of access to them are reasonable.”³ In the instant case the State has not provided an explanation or produced information that would allow one to infer that those formalities, allegedly violated, were reasonable, or that the petitioner failed to meet requirements or basic conditions for the admissibility of that complaint appeal (*recurso de queja*). The IACHR has repeatedly established that “whenever a State alleges that a petitioner has not exhausted domestic remedies, it has the burden of identifying the remedies to be and demonstrating that the remedies that have not been exhausted are ‘appropriate’ for redressing the alleged violation—in other words, that the function of those remedies within the national legal system is suitable for protecting the legal right infringed.”⁴ This burden that corresponds to the State includes the duty to specify which basic and reasonable formalities in the presentation of the suitable remedies must be fulfilled by the petitioner. That argumentative duty has not been met in any of its elements in the instant case, since the State has not indicated why the complaint appeal was suitable for pursuing the claims of Jonathan’s next-of-kin, nor

³ IACHR, Report No. 135/18, Petition 1045-07. Inadmissibility. Enrique Alberto Elías Waiman. Argentina. November 20, 2018, para. 10.

⁴ Report on Inadmissibility 26/16, Rómulo Jonás Ponce Santamaría v. Peru, para. 25.

which were the reasonable basic formalities that should have been satisfied by the appellants in its presentation, nor why those reasonable basic formalities were not met in the specific case. Therefore, the Inter-American Commission cannot conclude that there is a basis for rejecting the present petition on this ground.

13. Notwithstanding the above, as regards the decision of the Supreme Court of Justice that decided the extraordinary complaint appeal remedy filed by the next-of-kin of Jonathan Oros, given that the petitioner has argued (i) that it was based on reasons of mere formality, (ii) that those formalities could not be contested by the persons affected; and (iii) that the formalities were an apparent argument wielded by the Court to cover up different motivations for its decision, the IACHR considers it appropriate to examine, in the merits stage of this procedure, the possible repercussions of that course of decision-making and of the motivations established therein upon the judicial rights and guarantees protected by the American Convention, since those arguments characterize possible violations of Articles 8 and 25 of that instrument. Accordingly, in the instant case the Commission cannot take the reasons invoked in the judgment of the Supreme Court as indicators that there was a failure to exhaust domestic remedies by the petitioner which would render the petition inadmissible, since, as has been decided in previous cases on Argentina⁵, delving into the examination of an alleged arbitrary act and an excessive adherence to formality in the resolution of the complaint appeal would be inappropriate in the admissibility phase, which is characterized by a *prima facie* standard of review. To the same extent, given the specificities of this petition, and of the facts set forth therein, assuming that there was an improper exhaustion of remedies on the grounds of the reasoning explicitly stated by the Supreme Court of Justice would be tantamount to renouncing *a priori* the duty of the Inter-American Commission to establish, during the merits phase, which human rights have been harmed by the State actions put before in order to determine their legal consequences in light of the inter-American instruments which are binding upon Argentina, and to promote full reparations for the possible victims.

14. As for the termination of the criminal procedure conducted on account of the alleged victim's death, it is a fact not contested by the parties, which also stems clearly from the petition file, that it concluded with the September 1, 2009 ruling of the Supreme Court of Justice of the Nation that denied the complaint appeal filed by the petitioners, of which the petitioners were notified on September 4, 2009.

15. As for the timeliness of the petition, the Commission notes that said final judicial decision was notified to the petitioners on September 4, 2009; that the petition is dated March 1st, 2010; that it was physically submitted to the IACHR by certified mail; and that it was received by that postal channel at the Executive Secretariat of the Inter-American Commission on March 23, 2010.

16. In this regard, in cases in which a petition is sent via conventional mail before the expiration of the six month term established in Article 46(1)(b) of the Convention, but received at the IACHR some days after this period, the Commission has held a consistent position in the sense of presuming that those days elapsed during the time that the petition was in the course of being physically mailed, and allowing for its presentation within a reasonable term of several days. In this sense, for more than a decade the Inter-American Commission has admitted petitions that meet the two above-mentioned conditions and that were formally received at its Executive Secretariat between 5 and 21 days after the six month period has elapsed since the petitioner was notified of the decision exhausting domestic remedies (see, in brief: Report No. 173/17, para. 8; Report No. 60/14, para. 45; Report No. 115/12, paras. 41-42; Report No. 93/09, paras. 43-44; Report No. 20/09, para. 66; Report No. 79/08, paras. 38-39; and Report No. 69/08, para. 45). The Inter-American Commission has based this practice on the particular characteristics of each case and on an understanding, in agreement with the Inter-American Court, that "*the generally accepted principle that the procedural system is a means of attaining justice, and that justice cannot be sacrificed for the sake of mere formalities.*"⁶

17. Mindful of these considerations, the Commission concludes that the petition under review meets the requirement established at Article 46(1)(b) of the American Convention.

⁵ IACHR, Report No. 116/19, Petition 1780-10, Admissibility, Carlos Fernando Ballivián Jiménez, Argentina, July 3, 2019, para. 9.

⁶ IACHR, Report No. 20/09. Petition 235-00. Admissibility. Agustín Vladimiro Zegarra Marín. Peru. March 19, 2009, para. 66.

VII. ANALYSIS OF COLORABLE CLAIM

18. With regard to the State's arguments related to the so-called "fourth instance formula," the Commission reiterates that within the framework of its mandate it is competent to declare a petition admissible when it refers to domestic proceedings that may be in violation of rights guaranteed by the American Convention. Accordingly, for the purposes of determining the admissibility of a petition, the IACHR must decide whether the facts alleged, if true, tend to establish a violation of rights, in keeping with Article 47(b) of the American Convention, or if the petition is "manifestly groundless" or "obviously of order," as per Article 47(c). The criterion for evaluating those requirements differs from the one used to rule on the merits of a petition. Likewise, within the framework of its mandate it is competent to declare a petition admissible when it refers to domestic proceedings that may be in violation of rights guaranteed by the American Convention. In other words, according to the above cited provisions of the Convention, in keeping with Article 34 of its Rules of Procedure, the analysis of admissibility is focused on verifying those requirements, which refer to the existence of elements which, if corroborated, could constitute, *prima facie*, violations of the American Convention.⁷

19. The Commission observes that the petitioner has (i) articulated claims of possible State responsibility for the death of Jonathan Oros as a result of the gunshot wounds he received from an agent of the Police of Mendoza; (ii) provided information about possible physical assaults inflicted on Jonathan after having been wounded with a firearm, inside the police station; (iii) reported that Jonathan's family members were victims of police abuse in the hours after the incident, including death threats and physical and verbal assaults, as well as being impeded and blocked from having access to Jonathan while he was hospitalized; (iv) alleged that the family was not given access to the clinical information about Jonathan when he was hospitalized; and (v) alleged that there were possible violations of judicial guarantees in the criminal proceedings that stemmed from the facts up to their final resolution in the decision of the Supreme Court of Justice on the complaint appeal. On the grounds of these considerations, and after examining the legal and factual elements set forth by the parties, the Commission considers that the petitioner's arguments are not manifestly groundless and require a study on the merits, since the facts alleged, if corroborated, tend to establish violations of Articles 4 (life), 5 (humane treatment), 8 (fair trial), 13 (freedom of expression), and 25 (judicial protection) of the American Convention in relation to its Articles 1(1) (obligation to respect rights) and 2 (domestic legal effects), in the terms of this report, to the detriment of Jonathan Oros and Raúl Oros.

20. Likewise, should the alleged denial of access to clinical information to the relatives of the presumptive victim during the time that he was still alive at the Lagomaggiore Hospital -a public health institution- be proven during the merits stage, these facts may characterize violations of Article 13 (freedom of expression) of the American Convention to the detriment of Raúl Oros, the presumptive victim's father.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 4, 5, 8, 13, and 25 of the American Convention, in relation to its Articles 1.1 and 2; 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.

Approved by the Inter-American Commission on Human Rights on the 24th day of the month of April, 2020. (Signed): Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Julissa Mantilla Falcón, and Stuardo Ralón Orellana, Commissioners.

⁷ IACHR, Report No. 143/18, Petition 940-08. Admissibility. Luis Américo Ayala Gonzales. Peru. December 4, 2018, para. 12.