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REPORT No. 317/21
PETITION 1842-14
REPORT ON ADMISSIBILITY

M & C
COSTA RICA

Approved electronically by the Commission on November 4, 2021.

Cite as: IACHR, Report No. 317/21, Petition 1842-14. Admissibility. M and C. Costa Rica.
November 4, 2021.

I. INFORMATION ABOUT THE PETITION

Petitioners:	Center for Justice and International Law (CEJIL)
Alleged victim:	M and C ¹
Respondent State:	Republic of Costa Rica
Rights invoked:	Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 11 (privacy), 17 (rights of the family), 19 (rights of the child), 24 (equal protection), and 25 (judicial protection) of the American Convention on Human Rights, ² regarding Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof; and Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	December 12, 2014
Notification of the petition to the State:	April 24, 2019
State's first response:	August 26, 2019
Additional observations from the petitioner:	August 19, 2020
Additional observations from the State:	March 24, 2021

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 August 4, 1970) and Convention of Belém do Pará (instrument of ratification deposited on December 7, 1995)

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 5 (humane treatment), 7 (personal liberty), 8 (a fair trial), 11 (privacy), 17 (rights of the family), 19 (rights of the child), 24 (equal protection), and 25 (judicial protection) of the American Convention, in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof; and Article 7 of the Convention of Belém do Pará
Exhaustion or exception to the exhaustion of remedies:	Yes, exception in Article 46.2.a of the Convention applies
Timeliness of the petition:	Yes, according to section VI

¹ Due to the nature of the facts and the main victim's minority of age, in this public decision the IACHR will keep the victims' names confidential.

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

³ Hereinafter "Belem do Para Convention."

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

V. ALLEGED FACTS

1. The petitioning organization reports the perpetration of acts of physical, psychological, and sexual violence against Ms. M and girl C, by the father of the latter, which were not duly investigated in Costa Rica and led to the abduction of C to Panama.

2. The petitioners narrate that Mrs. M held a sentimental relationship between 2001 and 2008 in Costa Rica, as a result of which C was born on October 23, 2004. In September 2008, Ms. M separated from C's father and requested a protection order before the Court of Misdemeanors of Garabito, claiming that C's father physically and verbally assaulted her. In subsequent statements, Ms. M also reported that C's father drove her to enter prostitution in Costa Rica and Mexico, forced her to have sexual relations with him in the presence of the girl, and made C watch pornography. The investigation for the charge of procuring was dismissed by the public prosecutor's office because it did not obtain evidence or witness statements to support M's complaint; the only claim it confirmed was that both M and C's father entered and left Costa Rica for Mexico, with M using an identity card bearing another name. Likewise, in June and July 2010, the criminal investigation for charges of sexual crimes and child pornography committed to the detriment of C was dismissed, because the public prosecutor's office did not obtain evidence to support M's complaints.

3. On November 21, 2008, the Court on Pension and Domestic Violence of Escazú ruled that measures be granted to protect and assist M and C. In December 2008, Ms. M filed and withdrew a claim seeking the suspension of the parental rights of C's father because he had irregularly retained the girl after two-week holidays with her. It appears that M withdrew the petition in exchange for seeing her daughter again and signed an extrajudicial agreement for joint custody with C's father.

4. The petitioners state that in November 2008 and in January and October 2009, Ms. M lodged several complaints of acts of sexual violence committed against her and their daughter, and of her sexual exploitation by C's father. She filed for an extension of the restraining order, which was granted on February 25, 2009. And on May 25, 2009, she filed, with the Office of the Public Prosecutor of Garabito, a criminal complaint of a violation of the restraining orders, expressing her fear that C's father would kidnap the girl.

5. For his part, in January 2009, C's father filed a complaint against M, with Costa Rica's Judicial Investigations Department (hereinafter "OIJ"), claiming that M had abandoned their daughter several times and that she took drugs and alcohol and had a false identity. C's father also filed a complaint against M seeking the suspension of her custody rights. In the framework of these lawsuits, on January 26, 2009, Costa Rica's National Children's Trust ("PANI") awarded M temporary custody of the girl. While the proceedings for custody were being held by the Family Court, M lodged a counterclaim against C's father in February 2009, seeking to be awarded the sole physical and legal custody of the girl.

6. On December 5, 2009, when the proceedings for custody were still pending, C's father broke into M's house violently, attacked her and C's sitter, kidnapped the girl, and took her to Panama. The petitioners claim that, following the abduction of C, M pursued four legal actions to recover the custody of her daughter, namely: (i) the proceedings for custody previously filed in Garabito remained in progress; (ii) criminal proceedings in Costa Rica for the abduction of C; (iii) legal proceedings for protection from social risk in Panama; and (iv) proceedings for the international restitution of C to Costa Rica.

7. Family Court No. 2 for the San José Circuit jointly processed the claims that both parents filed against each other seeking the suspension of parental authority and custody. On March 22, 2010, the Court ordered that the father return the girl to the mother, but this was unsuccessful because the former had already taken the girl to Panama. On November 23, 2010, a hearing was called in the framework of the proceedings for custody, and C's father attended but left before it ended. On August 9, 2011, the trial court awarded precautionary measures in favor of C and M consisting in the temporary custody of the girl. Finally, on March 27, 2013, the trial court issued a judgment of first instance that suspended the parental authority of C's father.

8. Moreover, on the day that the girl was kidnapped, Ms. M filed a complaint against the father with the OIJ of Costa Rica, ratified before the same body on December 10, 2009. Subsequently, Ms. M learned

at the Immigration Department of San José that C's father had left for Panama thanks to a document purportedly signed by M for the girl to leave the country. Ms. M had come to the OIJ to report this event, and on June 15, 2011, the Assistant Prosecutor of Garabito requested that the complaint of abduction be dismissed because there was doubt about the responsibility of the person under investigation and whether he had taken the girl with the mother's permission.

9. On July 14, 2011, the Criminal Court of Garabito ruled the dismissed the criminal proceedings in favor of C's father. On November 16, 2012, the same Court dismissed the criminal case without notifying M. On February 12, 2014, M's lawyer filed a petition for the correction of procedural errors in proceedings, due to the alleged violation of M's right to defense. This petition was rejected on May 9, 2014, by the Criminal Court of Garabito; this court order was challenged on May 15, 2014. The Tribunal that heard the appeal called a hearing on June 11, 2014, in which M's appeal was finally rejected.

10. The petitioners argue that the adequate remedy exhausted by M was the proceedings for international restitution that had successful results in Panama and Costa Rica. At the same time, they state that M's criminal complaint of C's illegal retention was another remedy that she exhausted in Costa Rica's domestic system. However, the petitioners consider that the criminal proceedings for the charge of child abduction were ineffective as these were dismissed. They argue that although the dismissal was decided on November 17, 2012, the lawyer representing Ms. M filed for the correction of procedural errors in proceedings due to the violation of M's right to defense. This petition was declared inadmissible by the trial court on May 15, 2014, and by the court of appeals on June 11, 2014. To the petitioners, the period for filing this petition started running on June 11, 2014, and although they missed it by one day, they request that the IACHR consider the requirement of timeliness met and not sacrifice the access to justice for an excessively strict formality.

11. The petitioners allege that the Costa Rican authorities' failure to prevent and investigate with due diligence C's abduction entails the State responsibility for violating the girl's right to personal liberty and both alleged victims' rights to humane treatment, family life, and protection of the family. Faced with the arguments by the State in its final observations, the petitioners contend that the objections raised by Costa Rica are incompatible because it requests that the petition be declared to not meet the requirements of timeliness and exhaustion of domestic remedies. In addition, they assert that the State's argument that they appeal to the IACHR as a court of fourth instance of jurisdiction is not preliminary in nature, but addresses the merits of the dispute, to the extent that it is necessary to analyze whether the actions by the authorities were diligent and adequate.

12. For its part, Costa Rica asserts that, in the first place, the petition does not meet the requirement of timeliness because the dismissal of the criminal proceedings for child abduction was notified to M on November 1st, 2013. Thus, it deems that the period for filing this petition was due on May 1st, 2014, and that the petition, having been filed on December 12, 2014, is overdue. The State alleges that, under Costa Rican law, once criminal proceedings are dismissed, they are closed; and that, consequently, the remedy filed by M in 2014 was ineffective to change that decision. As to the proceedings filed by M to obtain measures of protection, the State asserts that these concluded in 2008 and 2009; that, consequently, the petition is overdue also regarding these claims.

13. As a subsidiary ground, the State alleges that Ms. M failed to exhaust domestic remedies. Concerning the decisions adopted by the PANI, the State contends that if M considered that the PANI did not apply due diligence, she should have filed an administrative complaint with the PANI's Executive Presidency and contentious-administrative proceedings. Regarding the criminal proceedings for the charge of child abduction, the State emphasizes that several procedures were conducted within the investigation, including a migratory alert issued on December 15, 2015, a report on the steps undertaken to locate C and her father, the publication of a yellow notice, and the review of other administrative, criminal, and family case files. The State alleges that although it acted with due diligence, Ms. M could have lodged a disciplinary complaint against the judicial officers that dismissed the case, as this would have been the adequate remedy to present her claim to the domestic courts. Regarding the criminal proceedings based on the complaint of the violation of the restraining orders, the State asserts that it cannot rule on this matter because the file on that case was destroyed in 2015, under the domestic rules.

14. Lastly, the State contends that this petition should be declared inadmissible because it violates the principle of subsidiarity and seeks to have the IACHR work as a court of fourth instance of jurisdiction. It asserts that the IACHR would not be able to rule on the merits of the dismissal of the criminal proceedings for the charge of child abduction, as it would have to analyze the whole body of evidence on the criminal case file and would be working as a court of fourth instance in these proceedings. Moreover, the State asserts that it worked with due diligence to locate C and that it confirmed that she did not leave the country with Ms. M's authorization because, according to the records of Costa Rica's Immigration Department, only C's father departed on December 7, 2009. It also claims that, from the records of that body, the last time the girl left the country was on September 3, 2009, with both of her parents; that, therefore, the IACHR should take into consideration the "complex family relations" between M and C's father, in deciding on the dismissal of the criminal case.

15. Furthermore, as to the proceedings seeking measures of protection, the State emphasizes that the measures of protection granted in favor of M were in force until January 29, 2010, and that, had she requested police protection, she would have had it. The State asserts that although the new petition for protection was shelved for lack of notice to the accused, M would have been able to request an extension of the measures in force then, and even file for a change of address, with the court.

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

Prior consideration

16. The petitioning organization requests that this matter be processed against Panama and Costa Rica jointly based on the argument that the alleged human rights violations had been committed continuously and that the authorities of both countries exercised concurrent jurisdiction over the unlawful abduction of C. The petitioners argue that dividing their petition into two separate matters would prevent the IACHR from holding both States responsible regarding different stages in the international abduction of C. The State of Costa Rica opposes the joint processing of this matter because it deems that the authorities of both countries adopted decisions with full independence from each other. The State alleges the violation of its right to defense because it submitted its initial reply without having first received express information about the facts it should be referring to, and it referred only to the events happening within the jurisdiction of Costa Rica. It claims that extraterritorial jurisdiction does not apply to this case and that the petitioners expected that Costa Rica had interfered in matters under Panama's domestic jurisdiction.

17. In this regard, the Inter-American Commission notes that Article 44 of the American Convention sets forth that petitions must be lodged for violations by a single State Party to the American Convention, in accordance with the regulation of the processing of petitions provided for in Article 23.1 of the IACHR Statute and Article 30 of its Internal Rules. None of the constituent instruments of the petition and case system of the Inter-American System of Human Rights sets forth the possibility to jointly process petitions against two or more States.

18. In its Reports on Admissibility No. 270/20 and 53/21 concerning petitions P-728-13 and P-729-13, respectively, the Commission declared the admissibility of two cases derived from a single petition filed against Peru and Ecuador, concerning the alleged detention, torture, and disappearance of an Ecuadorian foreign service officer amid an operation in Peru. In that case, although the Commission deemed that it was competent *ratione loci* to hear the complaint against Ecuador, as the alleged human rights violations derived from Ecuador's extraterritorial acts and omissions in relation to the disappearance of the alleged victim in Peru,⁵ the Commission processed the matter against each State separately to analyze international responsibility for the actions attributable to each one of them.

⁵ IACHR. Report No. 270/20, Petition 728-13. Admissibility. Enrique Roberto Duchicela Hernández and his family members. Ecuador. October 7, 2020, par. 27; IACHR. Report No. 112/10, IP-02, Franklin Guillermo Aisalla Molina. Ecuador - Colombia. October 21, 2010, par. 90.

19. Therefore, the Commission reiterates its practice of breaking down petitions containing complaints against more than one State. This does not prevent the IACHR from declaring the responsibility for the human rights violations attributable to each State depending on their degree of involvement in the facts. In this case, the Inter-American Commission decides to uphold its uniform and consistent practice as described above and will proceed to process each petition separately.

Exhaustion of domestic remedies and Timeliness of the petition

20. The Commission notes that a *remedy* according to Article 46.1 of the Convention is, by definition, a means of legal defense provided by the domestic legal system to anyone who feels that their rights have been infringed or harmed in the course of a State action, which allows them to seek reparation for that violation. In order to assess the adequacy of the remedies available to a given petitioner in the domestic legal system, the Commission usually determines the specific claim they formulate to identify thereafter what judicial remedies the domestic legal system provides were available and adequate to resolve the claim in particular.⁶

21. The petitioners claim, first, that the international restitution proceedings in Panama exhausted the domestic remedies in both States. With respect to this, the exhaustion of a remedy in the Panamanian jurisdiction does not bring the alleged victims' claim to the attention of Costa Rica. Thus, as a first step in the analysis, the Commission dismisses the first claim of the petitioners, whereby the international restitution proceedings in Panama exhausted the domestic remedies in Costa Rica.

22. Second, the petitioners assert that the criminal proceedings for child abduction was a remedy exhausted within the jurisdiction of Costa Rica and was ineffective because it was dismissed. On this point, Costa Rica argues that this petition is overdue because the dismissal of the criminal proceedings for the charge of child abduction was notified to M on November 1, 2013. According to it, the period for filing this petition was due on May 1, 2014, under the requirement established in Article 46.1.b of the American Convention, and the petition was lodged on December 12, 2014. The petitioners reply that the filing period started running on June 11, 2014, which is the date when the rejection of the appeal concerning the petition for the correction of procedural errors filed against the dismissal, was notified. The State contends that the petition for the correction of errors was manifestly inadmissible because, under Costa Rican law, no remedy is admissible against the dismissal of a criminal case.

23. The IACHR notes that the main claim about Costa Rica concerns the failure to prevent and the omission to act with due diligence in the investigation of C's abduction by her father, which the State could have prevented had it investigated with due diligence the alleged gender-based violence perpetrated by the accused against M. With regard to this, the adequate remedy to address the complaint of the kidnap of girl C was the criminal proceedings lodged for the charge of child abduction, as this was aimed at having the corresponding authorities locate C and restoring the custody of C to Ms. M. However, the petitioners consider that the criminal action for the charge of child abduction was ineffective, as it was dismissed.

24. The IACHR notes that Ms. M lodged at least four criminal complaints against C's father between 2008 and 2010, in which she brought to the attention of the Costa Rican authorities, the acts of domestic violence, the fact that their daughter girl was harassed and followed, and the sexual exploitation that she was subjected to during their sentimental relationship. Special emphasis is given to the complaint of the violation of the measures of protection, filed on May 25, 2009, within the criminal case, in which M expressed her fear that C's father would kidnap the girl. Once the kidnap took place, M reported it on December 5, 2009, to the Prosecutor's Office of the city of Garabito; however, only ten days after this, did the Costa Rican authorities issued a migratory alert for the girl and her father. These criminal proceedings initiated following this complaint of child abduction continued in place until their final dismissal in favor of C's father, which was notified to Ms. M on November 1, 2013.

⁶ IACHR, Report No. 89/21. Petition 5-12. Admissibility. Mine Workers of Cananea and their families. Mexico. March 28, 2021, par. 32.

25. To decide on the admissibility of a petition, the Commission must evaluate whether the domestic remedies available to the petitioners are adequate and effective; that is to say, whether they provide a real opportunity for an alleged human rights violation to be remedied and resolved by the national authorities before it is brought to the inter-American system.⁷ The exceptions to the requirement of the exhaustion of domestic remedies, outlined in Article 46.2 of the American Convention are closely connected to the determination of the possible violation of certain rights enshrined therein, such as the rights to a fair trial and effective judicial protection. Nevertheless, due to its nature and purpose, Article 46.2 is a rule with autonomous content separate from the substantive provisions of the American Convention. Therefore, the determination of whether the exceptions to the rule of exhaustion of domestic remedies apply to the matter at issue must be prior to and independent from the analysis of the merits of the case, as it depends on a different criterion than that used for determining the possible violation of Articles 8 and 25 of the Convention.

26. In this understanding, the IACHR believes that *prima facie* the criminal investigation for child abduction initiated in Costa Rica turned ineffective because although the State took several steps to locate C and her father, the State allegedly omitted to issue the migratory alert promptly, which led to the girl's abduction to Panama. In addition, there is the omission to investigate the complaints lodged by M between 2008 and 2009, even more so when the results of these could have helped to prevent the abduction of C. The Commission has not found in the case file the decision to dismiss the criminal proceedings for the charge of child abduction, and the State has not provided clear grounds for adopting such a decision.

27. Therefore, the Commission deems that it should apply to this matter the exception to the requirement of exhaustion of domestic remedies, set forth in Article 46.2.a of the American Convention, and concludes that this petition was filed within a reasonable time under the terms of Article 32.2 of the IACHR Rules of Procedure.

VIII. ANALYSIS OF COLORABLE CLAIM

28. The Commission reiterates that for admissibility, it must decide whether the facts alleged may characterize a human rights violation under the provisions of Article 47.b of the American Convention or whether the petition is “manifestly groundless” or “obviously out of order,” according to subparagraph (c) of the said article.

29. In this case, it is alleged that Ms. M timely reported the acts of physical, psychological, and sexual violence committed against her and her daughter and that she even expressed her fear that her daughter would be kidnapped. Ms. M reported C's abduction on the same day that this happened. The State asserts that it took several steps within the criminal proceedings, including the publication of a migratory alert, the examination of the case files on domestic violence, interviews to witnesses presented by Ms. M, the drafting of an investigation report, and records of the migratory moves of C and her parents. In regard to the criminal proceedings following the complaint of sexual exploitation, the State informs that these were dismissed.

30. In cases involving domestic violence, this Commission has established that States are obliged to respond effectively and in a coordinated fashion to enforce the terms of restraining orders to protect the victims,⁸ which means that authorities must act immediately and expeditiously when girl-children are reported kidnapped in such a context.⁹ In this regard, States must bear in mind that usually boys, girls, and adolescents witness acts of domestic violence and that the restraining order may be the only legal remedy available to women victims, along with their children, to be protected from imminent harm; that, therefore, measures of protection must be implemented with due diligence.¹⁰ Moreover, Article 7 of the Convention of Belem do Para establishes the obligation for States to adopt legal measures to punish violence against women. In regard to this, the Committee on the Elimination of Discrimination against Women recommends that States ensure that

⁷ IACHR, Report No. 89/21. Petition 5-12. Admissibility. Mine Workers of Cananea and their families. Mexico. March 28, 2021, par. 32.

⁸ IACHR. Report No. 80/11, Case 13.626. Merits. Jessica Lenahan (González) *et al.* United States. July 21, 2011, par. 145.

⁹ IACHR. Report No. 80/11, Case 13.626. Merits. Jessica Lenahan (González) *et al.* United States. July 21, 2011, par. 165.

¹⁰ IACHR. Report No. 80/11, Case 13.626. Merits. Jessica Lenahan (González) *et al.* United States. July 21, 2011, par. 163.

all forms of gender-based violence, which amount to a violation of their physical, sexual, or psychological integrity are criminalized and introduce legal sanctions commensurate with the gravity of the offense.¹¹

31. In this case, after analyzing the documentation provided by the parties, the Commission has no specific information about real measures adopted by the State to locate girl C and her father nor about the authorities' publication of an immediate alert to the officers of the Immigration Department. Moreover, it is a reason for worry that the State has omitted to undertake real actions within other criminal proceedings and to adopt measures of protection to help prevent the kidnap of C. Although Costa Rica granted restraining orders in favor of M, it omitted to criminally investigate C's father for domestic violence perpetrated against the alleged victim; it did not provide support about the investigation of the complaint of sexual violence perpetrated against M and C, and it dismissed the case for the charge of sexual exploitation. The foregoing is particularly serious in this case because this appears to have led to the international abduction of girl C.

32. Consequently, the Commission believes that the claims submitted by the parties require an analysis of the merits to determine whether the decisions adopted by Costa Rica's judicial authorities were adequate and effective to prevent and punish with a gender-based perspective. If proven to be true, the facts alleged by the petitioners may constitute violations of the rights recognized in Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 11 (privacy), 17 (rights of the family), 19 (rights of the child), 24 (equal protection), and 25 (judicial protection) of the American Convention, regarding Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof; and Article 7 of the Convention of Belém do Pará.

VIII. DECISION

1. To declare this petition admissible regarding Articles 5, 7, 8, 11, 17, 19, 24, and 25 of the American Convention, in relation to Articles 1.1 and 2 thereof, and Article 7 of the Convention of Belém do Pará; and

2. To notify the parties of this decision; to continue with the analysis of 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 4th day of the month of November, 2021. (Signed:) Antonia Urrejola, President; Julissa Mantilla Falcón, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Joel Hernández, and Stuardo Ralón Orellana, Commissioners.

¹¹ CEDAW. General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19. CEDAW/C/GC/35. July 26, 2017, par. 29.a.