

OEA/Ser.L/V/II.168
Doc. 69
5 May 2018
Original: Spanish

REPORT No. 59/18
PETITION 871-08
REPORT ON ADMISSIBILITY

TATIANA MARISA BARRÍA MARDONES and B.B.A.B.
CHILE

Approved by the Commission at its session No. 2128 held on May 5, 2018.
168th Special Period of Sessions.

Cite as: IACHR, Report No. 59/18, Petition 871-08. Admissibility. Tatiana Marisa Barría
Mardones y B.B.A.B. Chile. May 5, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Karina Retamal Mella
Alleged victim:	Tatiana Marisa Barría Mardones and B.B.A.B. ¹
Respondent State:	Chile ²
Rights invoked:	Articles 5 (humane treatment), 8 (fair trial), 11 (privacy) and 25 (judicial protection) of the American Convention on Human Rights, ³ in conjunction with articles 1 (obligation to respect rights) and 2 (domestic legal effects)

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	July 24, 2008
Notification of the petition to the State:	June 16, 2016
State's first response:	February 13, 2017

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 deposited on August 21, 1990) and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (instrument deposited on November 15, 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 5 (humane treatment), 8 (fair trial), 19 (rights of the child), 24 (equal protection), and 25 (judicial protection) of the American Convention in conjunction with its articles 1(1) (obligation to respect rights) and 2 (domestic legal effects); 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)(c) of the Convention applies
Timeliness of the petition:	Yes, pursuant to the terms of Section VI

¹ The petitioner asks that the alleged victim's identity be kept confidential because she was a child at the time the petition was submitted.

² Commissioner Antonia Urrejola, of Chilean nationality, did not participate in the deliberations nor in the decision in this case, in keeping with the provisions of Article 17(2)(a) of the Rules of Procedure of the Commission.

³ Hereinafter the "American Convention" or the "Convention."

⁴ The comments of each party were duly forwarded to the counter-party.

V. ALLEGED FACTS

1. The petitioner alleges that the alleged victim, Tatiana Marisa Barría Mardones, had a romantic relationship that ended in 2003 as a result “the physical and psychological violence she suffered.” She states that on March 11, 2007, while she was at home with her 12-year-old daughter and her partner at the time, Luis Santos, her ex-partner arrived with his brother, who, between insults, started throwing rocks and other objects on the roof of the house to get the alleged victim to come out. She stated that outside her home, her ex-partner cursed and insulted her. Luis Santos reacted to this by telling him to leave, to which the attacker reacted by cursing more and striking him, causing injury. She states that the alleged victim’s daughter saw what was happening from a window and started to scream, at which the attacker left, saying he would return to kill them. She states that after Luis Santos reentered the house, the alleged attacker returned and beat on the door, demanding they open it and repeating his threats. She says they called the Carabineros [police], who “arrived and did nothing to stop the brothers [...] even though the aggressor was identified, in flagrante delicto, and all the information necessary for his capture had been provided.” She states that they went to the emergency room, and each of the injured parties described their complaint to the police. She alleges that from that point on, Ms. Barría was considered a witness, not a victim. She states that at that point, the alleged victim was informed she would be called to testify.

2. She states that on March 15, 2007, Luis Santos filed a criminal complaint against the alleged attacker “for the injuries and threats of which he was a victim.” In response, the Office of the Public Prosecutor “ordered an investigation only regarding his legal claim, without considering the victim.” She states that the alleged victim therefore went to the office of the Prosecutor to demand her statement be taken, where “the Public Ministry official did so very informally and unprofessionally, without the presence of the Prosecutor in charge of the investigation.” At that time, the alleged victim was supposedly not referred to the Victims and Witnesses Support Unit, which she should have been. The petitioner adds that on April 3, 2007, in execution of an investigative order issued by the Office of the Public Prosecutor, the alleged victim was summoned to give a statement at police headquarters. At that time, a carabinero took notes of her statements, and the police report concluded that injuries took place to the detriment of Luis Santos, omitting the threats of which she was the victim and the illegal invasion of her dwelling.

3. She states that in response to the lack of an investigation into the complaints related to the alleged victim, on April 23, 2007, she filed a criminal complaint alleging threats that referred to both the previous acts of violence committed by her ex-partner and what happened in 2007. In the denunciation she described the events of March 11, 2007 and indicated that she decided to present a complaint because “on many prior occasions I have been intimidated, harmed and threatened by this person which has left me with fear, insecurity and terror that at some moment he will carry out his death threats.” She indicated that the relationship ended in 2003 due to “physical and psychological violence,” that “I never dared to denounce because of the reiterated death threats.” In the complaint she described threats, being followed, and harassment, and indicated that because of this, “I decided to change where I lived and worked and move to the city of Coyhaique thinking that he wouldn’t bother me anymore because he wouldn’t know my new place of residence.” Regarding this complaint, she states that the Office of the Public Prosecutor submitted a hearing request for a simplified procedure into the crimes against Luis Santos and another hearing to communicate its decision to not prosecute the crimes against the alleged victim. She states that because the alleged victim had not been notified, the hearing had to be postponed until August 2, 2007.

4. She states that the alleged victim’s private attorney requested admission of eight evidentiary procedures—including collecting a statement from Luis Santos and the information from a complaint from 2003 against the alleged attacker “for injury caused during an attack on her and others, with the aim of demonstrating a pattern of attacks”—of which the Office of the Public Prosecutor only admitted two witness statements, rejecting others, including summoning Luis Santos to provide a statement. In this regard, she alleges that the Prosecutor never summoned the alleged victim to provide him with a statement, and the Office of the Public Prosecutor inquired about the facts from 2007 even though the subject of the witness statements was previous facts, as the witnesses had not been present during the facts that took place in 2007. In addition, she alleges that the interrogation of the daughter of the alleged victim was hostile, and that at that time, the Prosecutor stated that he would not take a statement from the alleged victim, suggesting she turn to the family

courts. She thus states that the alleged victim twice prevented the investigations from being closed by presenting requests to gather evidence against the alleged attacker.

5. She states that on January 2, 2008, a hearing was held during which the collection of new evidence was ordered. She indicates that on January 25, 2008, a hearing was held during which the Prosecutor exercised his authority to drop the investigation, upon which the Guarantee Judge of Coyhaique decided to close the investigation. She alleges that the alleged victim was summoned to the hearing, but that she was not informed beforehand of its purpose, for which reason she was not able to exercise her right to object to the closure of the investigation. She adds that the alleged victim was also not provided with an opportunity to give her opinion on this decision, in violation of Article 248 section (c) of the Criminal Procedural Code (hereinafter the "CPC"), which establishes that to order the closure of an investigation, it must first be formalized and all the necessary steps must be taken to ascertain the facts and identify the perpetrators. It alleges that, in this case, the investigation was not formalized and none of the requested measures to gather evidence were taken.

6. The information provided indicates that on February 4, 2008, the alleged victim asked the Prosecutor to conduct evidence gathering procedures and to continue the investigation because she had not been notified of the reason for the hearing. The request was rejected on February 5, 2008. The petitioner alleges that the alleged victim did not have an adequate remedy available to her, as forcing continuation of the investigation, as provided for in Article 258 of the CPC, is not a simple and quick remedy. She adds that this remedy prevented the alleged victim from demanding evidentiary measures be taken that she could indeed request of the prosecutor.

7. In summary, the petition alleges that in 2007 the presumed victim presented a complaint against her former partner for domestic violence, with respect to various alleged acts of aggression as from at least 2003 up to March of 2007, and specifically denounced that he had threatened to come back and kill her. The petition affirms that the response of the State centered on the investigation of the injuries sustained by her current partner, without investigating the alleged prior acts or the situation of risk that she identified.

8. For its part, the State indicates that the facts alleged do not represent a violation of the rights guaranteed in the Convention. It states that the decision to drop a criminal investigation falls under the authority of the Office of the Public Prosecutor in the event of a lack of sufficient evidence on which to base charges. It notes that this is a technical decision, not a reflection of discretion, lack of interest, or excessive workload on the part of the public officials. It adds that even in these cases, if new information comes to light subsequent to the closure of the investigation, the Prosecutor has the authority to reopen it. It adds that in this case, the petitioner has not included any information indicating that new information was provided to the Prosecutor in the case. It submits that the petitioners are attempting to use the Commission as a fourth instance to review a ruling that was not in their favor.

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

9. The petitioner alleges she filed a series of requests for gathering evidence with the Office of the Public Prosecutor in order for the investigation to continue. She states that at the hearing to close the investigation on the Office of the Public Prosecutor's exercise of its authority to do so, the alleged victim was not provided with an opportunity to give her opinion, in violation of Article 248, section (c) of the CPC. She also alleges that the alleged victim did not have an adequate remedy available to her, as forcing continuation of the investigation, as provided for in Article 258 of the CPC, is not a simple and quick remedy. For its part, the State argues that if new information comes to light subsequent to the closure of the investigation, the Prosecutor has the authority to reopen it.

10. The Commission observes that in this case, the alleged victim says she had filed a police report regarding the facts and that because she was treated as a witness to the facts and not a victim, she filed a criminal complaint against the person allegedly responsible for the threats. The Commission observes that the alleged victim filed the criminal complaint about the threats on April 23, 2007, and that on January 25, 2008, the Prosecutor exercised his authority to drop the investigation, upon which the guarantee judge closed the

investigation. As the State noted, the investigation can be reopened should new information be submitted, so it is not definitively closed. In cases alleging threats to life and safety, a criminal process is the most appropriate method for resolving the facts, bringing those responsible to trial, and establishing the corresponding criminal punishments. Because of this, and considering that 11 years have passed since the facts alleged and that the alleged deficiencies in the investigation prevented full resolution of the facts and determination of potential criminal responsibility, the Commission finds that the exception established in Article 46(2)(c) of the Convention is, *prima facie*, applicable. The Commission deems it pertinent to analyze the suitability and effectiveness of the domestic remedies in this case during the merits stage to establish whether violations of the Convention effectively took place.

11. Additionally, the petition before the Commission was received on July 24, 2008; the alleged facts of the claim took place starting in 2007; and the alleged denial of justice extends to the present day. Therefore, in view of the context and the characteristics of this case, and taking into account that to date, no final judgment has been issued in this case, the Commission finds that the petition was presented within a reasonable period of time and that the admissibility requirement on the submission deadline is satisfied.

VII. ANALYSIS OF COLORABLE CLAIM

12. By virtue of the obligations set out in the Convention of Belem do Para, States have the duty to prevent, punish and eradicate all forms of violence against women, “whether in the public or the private sphere.” Taking into account that the petitioner alleges that the presumed victim made various efforts to denounce an alleged situation of aggression at the hands of her former partner, and that this also affected her daughter, without encountering a diligent or effective response from the State, the Commission considers that the situation presented requires an analysis at the merits stage.

13. In this regard, in view of the elements of fact and law presented by the parties and the nature of the matter under consideration, the Commission finds that, if proven, the facts alleged by the petitioner concerning a lack of due diligence in the investigation of the alleged threats, harassment and persecution and in the punishment of the person presumed responsible, as well as the allegations that B.B.A.B. was present during the acts of violence and with respect to the way she was treated during the process, could represent violations of the rights protected in Articles 5, 8, 24 and 25 of the American Convention, in relation to Articles 1(1) and 2 thereof, as well as Article 7 of the Convention of Belém do Pará. Regarding B.B.A.B. specifically, the facts could represent a violation of Article 19 of the American Convention.

14. Additionally, regarding the claim of alleged violation of Article 11 of the American Convention, the Commission observes that the petitioner has not submitted pleadings or sufficient evidence to support declaring that claim admissible.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 8, 19, 24, and 25 of the American Convention, in relation to Articles 1(1) and 2 of the American Convention; and Article 7 of the Convention of Belém do Pará.

2. To find the instant petition inadmissible in relation to Article 11 of the American Convention on Human Rights; and

3. To notify the parties of this decision; 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 in the city of Santo Domingo, Dominican Republic, on the 5th day of the month of May, 2018. (Signed): Margarete 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, and Flávia Piovesan, Commissioners.