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REPORT No. 187/22
PETITION 1038-17
REPORT ON ADMISSIBILITY

G.S.M.E.S.C.
MEXICO

Approved electronically by the Commission on June 14, 2022.

Cite as: IACHR, Report No. 187/22. Petition 1038-17. Admissibility. G.S.M.E.S.C.
Mexico. June 14, 2022.

I. INFORMATION ABOUT THE PETITION

Petitioner:	G.S.M.E.S.C
Alleged victim:	G.S.M.E.S.C ¹
Respondent State:	Mexico ²
Rights invoked:	Articles 8 (right to a fair trial) and 25 (right to judicial protection) of the American Convention on Human Rights ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	June 6, 2017
Additional information received at the stage of initial review:	January 25, 2019; February 25, 2019; July 3, 2020; July 7, 2020.
Notification of the petition to the State:	April 20, 2020
State's first response:	March 29, 2022

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 March 24, 1981)

IV. DUPLICATION OF PROCEEDINGS 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), 24 (equal protection), and 25 (judicial protection) of the American Convention, in conjunction with Article 1.1 thereof (obligation to respect rights); and Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará).
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, as indicated in section VI
Timeliness of the petition:	Yes, as indicated in section VI

V. FACTS ALLEGED

1. G.S.M.E.S.C, the alleged victim and petitioner, contends that the State discriminated against her as a trans woman when authorities of the Yucatán State Prosecution Service (FGE) failed to investigate with due diligence the acts of sexual violence committed against her by a third party. She further claims that her case remains unpunished to date.

¹ Given the nature of the facts denounced, the IACHR will keep the identity of the alleged victim restricted.

² In keeping with Article 17.2.a of the Commission's Rules of Procedure, Commissioner Joel Hernández, a Mexican national, did not participate in the debate or decision on this case.

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

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

2. The petitioner states that on March 20, 2014, between around 9:00 p.m. and 9:30 p.m., an individual (for the purposes of this report referred to as “H.T.”) sexually and physically assaulted her and that, as a result of the attack, she suffered injuries to her face that later required reconstructive surgery. She further contends that the incident caused her physical and psychological consequences with which she still has to deal up to the present.

3. She states that she reported the incident in July 2015 and that, on July 10 of that year, the Specialized Investigation and Litigation Unit for Sexual Crimes of the Yucatán State Prosecution Service opened investigation file S1/323/2015. However, on January 23, 2018, the Prosecution Service resolved not to pursue the criminal prosecution of her assailant on the grounds that there was no evidence to establish the alleged facts.

4. She reports that she filed an appeal against that resolution but that on February 27, 2018, the Second Control Judge of the First Judicial District of the Accusatory and Oral Criminal Justice System of the state of Yucatán confirmed that no criminal action would be brought. As a result, on March 20, 2018, she lodged an application for *amparo* relief, requesting judicial protection in view of the possibility that the alleged facts could go unpunished. Subsequently, on September 5, 2018, the First District Court of the state of Yucatán granted the *amparo* and ordered the Second Control Judge to vacate his decision and set a new date for another authority to examine the case afresh.

5. In compliance with that decision, the petitioner reports that on October 22, 2018, the Control Judge of the First Judicial District of the Accusatory and Oral Criminal Justice System of the state of Yucatán, after a hearing with the parties involved, overturned the decision not to pursue criminal action so that the facts could be effectively investigated.

6. In spite of this, she states that on March 21, 2020, the Yucatán Prosecution Service again resolved not to pursue criminal action, using the same grounds as the initial decision and adding that the complaint against the alleged attacker was filed when statutory limitations for the purported crimes had already expired. The petitioner filed a fresh appeal against that decision and, on June 11, 2020, the Mérida Justice Center overturned the decision not to prosecute so that the investigation of the alleged facts could continue (the petitioner does not provide further details on the grounds for this decision). Despite this, she maintains that to date the incident remains unpunished.

7. In accordance with the above claims, the petitioner contends that the State discriminated against her as regards the right of access to justice, causing new violations of her rights. She claims that throughout the investigation she was revictimized by the authorities, who on more than one occasion requested ridiculous and incongruous evidence to support her accusations. In addition, the investigation file of her case has been halted on several occasions, under the argument that priority should be given to other investigations into acts of violence against underage girls. In the alleged victim’s opinion, these practices demonstrate that she suffered discrimination on account of her gender identity.

8. Finally, she reports that on January 25, 2016, she filed a complaint with the Yucatán Human Rights Commission against the officials of the state’s Prosecution Service and other authorities. On October 16, 2018, however, Human Rights Commission closed the file, concluding that there was an evident lack of grounds to continue with the investigation since the case was still being processed by the criminal justice system. The alleged victim contends that this decision aggravated her situation by leaving her helpless against the purported arbitrary actions of the Mexican justice system.

9. In turn, the Mexican State offers clarifications and an additional series of facts for the IACHR to assess in deciding on the case at hand. It contends that after it was apprised of the complaint, the Yucatán State Prosecution Service informed G.S.M.E.S.C of the need for forensic physicians to conduct medical examinations; however, the petitioner replied that she did not wish to have such examinations performed, since the events had occurred more than a year previously and she therefore did not consider those formalities necessary.

10. That notwithstanding, the State indicates that two years after the incident, the petitioner agreed to undergo the proposed medical examinations. As a result, the forensic physician responsible for the examination concluded that G.S.M.E.S.C did not show signs of any external injuries and that the lesions to her nose were due to a range of etiological factors. In addition, in a later expert opinion, another doctor confirmed that it was not possible to establish the physical condition of her nose prior to the aggression, or after her first surgery.

11. Mexico further reports that on December 9, 2015, G.S.M.E.S.C appeared before the Institute for Gender Equity of the state of Yucatán to request that she be assigned a legal advisor to provide guidance or to participate in her representation. It notes that in order to comply with the right of all victims to receive legal advice from the State, the Institute proceeded to appoint a legal advisor, assigned to the Directorate of Victim Attention of the Nayarit State Prosecution Service as it was at the time. It also contends that G.S.M.E.S.C received attention from the Institute and other state agencies whenever she requested it.

12. Finally, Mexico reports that on August 21, 2015, H.T. appeared before the Prosecution Service, accompanied by his private defense counsel, and stated that: *"The facts narrated by [G.S.M.E.S.C] in the investigation are partially true (...) However, the facts did not occur as he describes. I have never abused him and neither did I cause the nose injuries to which he refers; if that had been the case, he would have made the complaint at the time and not a year later."* It explains that the Prosecution Service took this information into consideration, in addition to the expert medical reports, in deciding not to prosecute.

13. Based on the aforesaid considerations of fact, the State contends that the petition is inadmissible, since it is clear that domestic remedies have not been exhausted. It notes that the petitioner filed an *amparo* suit to challenge the decisions resolving not to pursue criminal action against H.T., as a result of which the investigation file currently remains at the initial investigation stage, awaiting a response from another medical specialist requested by the Yucatán Prosecution Service. In the State's opinion, this shows that the petitioner lodged the petition before the investigation was reopened and that therefore the requirement contained in Article 46.1.a of the American Convention was not met.

14. Mexico further argues that the alleged facts do not tend to establish human rights violations. It contends that although the purported acts of violence occurred in March 2014, the alleged victim did not file a criminal complaint until July 2015. It argues that according to the provisions of the Criminal Code of the state of Yucatán, since more than one year had elapsed between the commission of the purported crime and the filing of the complaint, statutory limitations had been triggered with respect to the alleged facts.

15. In spite of this, Mexico maintains that an investigation was conducted and that the procedures established by law were carried out. It emphasizes that throughout those proceedings, the authorities took account of the alleged victim's gender identity and that the investigations were carried out with gender awareness. It also states that G.S.M.E.S.C was provided with legal advice and psychological support by the Directorate for Victim Attention attached to the Prosecution Service, by the Institute for Gender Equity (as it was styled at the time), and by the Executive Commission for Victim Attention, all agencies of the state of Yucatán; thus, it emphasizes that the petitioner was at all times treated in a friendly, efficient, empathetic, nonstereotypical, and nondiscriminatory manner.

16. In view of the foregoing, the Mexican State maintains that the facts set out in the instant petition do not constitute human rights violations, given that the Mexican authorities guaranteed the petitioner's human rights in accordance with the guiding principles of nondiscrimination, judicial guarantees, and due process. In consideration whereof, it requests that the IACHR declare the claim at hand inadmissible and send it to the archive.

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

17. The IACHR again states that whenever evidence exists that a sexual attack has been committed, the ideal remedy for clarifying the facts, prosecuting those responsible, and affording other forms

of redress is a criminal trial.⁵ It also notes that such sexual attacks constitute violence against women, for which reason the State must not only pursue a criminal investigation but also proceed with due diligence and adopt specific measures that take into account the victim's situation of vulnerability. Moreover, in cases involving violence against trans women, the Inter-American Court has already held that such acts are gender-based and respond to a specific pattern of discrimination and that, as such, their particularities must be taken into account in dealing with them in order to ensure an appropriate and effective response.⁶

18. In the case at hand, the Commission notes that although G.S.M.E.S.C reported that she was a victim of sexual violence in 2015, to date the investigations have not yet been completed, since the courts found, on two occasions, that the Prosecution Service authorities had not investigated the facts appropriately by failing to adopt an appropriate gender perspective. Therefore, since the delay in resolving the case is attributable to officials of the State, the Commission believes that the exception provided for in Article 46.2.c. of the American Convention is applicable. Likewise, since the petitioner filed her petition on June 6, 2017, the Commission finds that the complaint was lodged within a reasonable period of time, thus meeting the requirement contained in Article 32.2 of its Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

19. In light of the elements of fact and law set out by the parties and of the nature of the matter placed before it, the Commission believes that the alleged delay and lack of an effective investigation into the acts of sexual violence reported by G.S.M.E.S.C could, if proven, tend to establish possible violations of the rights recognized in Articles 8 (right to a fair trial), 24 (equality before the law), and 25 (judicial protection) of the American Convention, in conjunction with Articles 5 (humane treatment) and 1.1 (obligation to respect rights) thereof. Similarly, following its own precedents⁷ and the case law of the Inter-American Court,⁸ at the merits stage the IACHR will analyze whether the facts presented could also constitute a violation of Article 7 of the Convention of Belém do Pará.

VIII. DECISION

1. To declare this petition admissible in relation to Articles 5, 8, 24, and 25 of the American Convention, in conjunction with Article 1.1 thereof, and in relation to Article 7 of the Convention of Belém do Pará.

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 14th day of the month of June, 2022. (Signed:) Julissa Mantilla Falcón, President; Stuardo Ralón Orellana, Vice President; Margarette May Macaulay, Second Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Roberta Clarke and Carlos Bernal, Commissioners.

⁵ IACHR, Report No. 154/10. Petition 1462-07. Admissibility. Linda Loaiza López Soto and Next of Kin. Venezuela. November 1, 2019, para. 49; IACHR, Report No. 129/99. Ana, Beatriz, and Celia González Pérez. Mexico. November 19, 1999, paras. 26-29.

⁶ I/A Court H.R. *Case of Vicky Hernández et al. v. Honduras*. Merits, Reparations, and Costs. Judgment of March 26, 2021. Series C No. 422, para. 128.

⁷ IACHR, Report No. 46/18. Petition 1638-12. Admissibility. Raiza Isabela Salazar. Colombia. May 4, 2018, para. 14.

⁸ I/A Court H.R., *Case of Vicky Hernández et al. v. Honduras*. Merits, Reparations, and Costs. Judgment of March 26, 2021. Series C No. 422, paras. 126-136.