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**REPORT No. 111/19**  
**PETITION 335-08**  
REPORT ON ADMISSIBILITY

MARCELO GERARDO PEREYRA  
ARGENTINA

Approved electronically by the Commission on June 7, 2019.

**Cite as:** IACHR, Report No. 111/19, Petition 335-08. Admissibility. Marcelo Gerardo Pereyra.  
Argentina. June 7, 2019.



**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Defensoría General de la Nación Argentina
<b>Alleged victim:</b>	Marcelo Gerardo Pereyra
<b>Respondent State:</b>	Argentina
<b>Rights invoked:</b>	Articles 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial) and 19 (rights of the child) of the American Convention on Human Rights <sup>1</sup> , in relation to Articles 1 (obligation to respect rights) and 2 (domestic legal effects); and other international treaties <sup>2</sup>

**II. PROCEEDINGS BEFORE THE IACHR<sup>3</sup>**

<b>Filing of the petition:</b>	March 19, 2008
<b>Notification of the petition to the State:</b>	May 11, 2012
<b>State's first response:</b>	February 26, 2018
<b>Additional observations from the petitioner:</b>	June 15, 2016; June 14, 2018; April 10, 2019
<b>Additional observations from the State:</b>	February 19, 2019

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes (deposit of instrument made on September 5, 1984)

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

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible</b>	Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial) and 19 (rights of the child) and 25 (judicial protection) of the Convention, in relation to Articles 1 (obligation to respect rights) and 2 (domestic legal effects)
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, September 25, 2007
<b>Timeliness of the petition:</b>	Yes

**V. FACTS ALLEGED**

1. The petitioner alleges that the State violated the human rights of Marcelo Gerardo Pereyra (hereinafter "the alleged victim" or "Mr. Pereyra"), an adolescent at the time of the events, by prosecuting and

<sup>1</sup> Hereinafter "the Convention" or "the American Convention".

<sup>2</sup> Articles 3, 37 and 40 of the Convention on the Rights of the Child. With regard to these invoked rights, the IACHR recalls that it lacks competence to declare violations of rights enshrined in the Convention on the Rights of the Child, but is able to refer to its standards in order to interpret rules of the American Convention by virtue of its Article 29.

<sup>3</sup> The observations submitted by each party were duly transmitted to the opposing party.

convicting him without taking account of his age and without ensuring access to a comprehensive review of his sentence.

2. It indicates that on March 28, 2003, the Juvenile Court found the alleged victim guilty of armed robbery (three counts), attempted armed robbery and accessory in the offense of murder in the course of a robbery, offenses committed when he was between 16 and 17 years old. The Court also ordered the termination of the juvenile supervision treatment (psychological interviews) he was undergoing. Before imposing the penalty, the defense requested that sentencing be delayed until he reached 21 years of age, as determined by Law 22,278 governing the Criminal Young Offenders Regime, in order for him to continue receiving psychological treatment recently undertaken. On August 29, 2003, when the alleged victim was 20 years old, the Court imposed a 13-year prison sentence without taking into account the principle of subsidiarity of the penalty and his age. The alleged victim challenged this decision and once more requested postponement of the sentence. The Prosecutor's Office also challenged the decision by a request that it be increased to 20 years imprisonment.

3. On July 30, 2004, the Court of Appeals increased the prison sentence to 17 years on the grounds that the first instance penalty failed to reflect the seriousness of the offense and the lack of remorse shown by the alleged victim. According to the petitioner, when the sentence was increased, the Chamber failed to justify the need to increase the sentence, nor did it take into account the age of the alleged victim. Given that the increased sentence was imposed at second instance, the alleged victim filed a series of extraordinary remedies to challenge it, and failed to have the merits of the decision reviewed. The petitioner argues that the 17-year prison sentence should be considered as a first conviction inasmuch as it aggravated the situation of the alleged victim, and it expects a review thereof including a thorough examination of the decision that caused this deterioration.

4. According to the petitioner, Law 22,278 is incompatible with the American Convention because it fails to provide alternative punishment to the deprivation of liberty for juvenile offenders and therefore violates the principle of subsidiarity of this type of sentencing. In addition, the legislation fails to take into account that when applied to a minor, the sentence of a deprivation of liberty must be reduced, consideration given to the offender's age, and be based on the objective of rehabilitation and social re-integration. In addition, the petitioner argues that instead of foreseeing a reduction in the sentence applicable to a minor in accordance with the standards of the Convention on the Rights of the Child and the American Convention, Law 22,278 provides that deprivation of liberty is similarly applicable to a minor as it would be to an adult. It notes that these deficiencies allow for arbitrary interpretations of the law, permit the imposition of a custodial sentence based solely on the criterion of danger posed by the accused and allow the imposition of disproportionate penalties constituting cruel, inhuman and degrading treatment, as is the present case of the alleged victim.

5. The State indicates that Law 22,278 establishes the principle of non-punishment, but contemplates the need for its application in the face of serious harm inflicted. It adds that on the alleged victim's first instance conviction and sentencing, the Juvenile Court took into account his age and analyzed all the juvenile supervision treatment received since 1999 when he was 15 years old. In that sense, the Judge took into account that: i) in 1999, he was arrested for an offense and was then given the opportunity for release on the promise of attending assisted parole treatment, which was interrupted by a fresh detention; ii) before the new arrest, he was given the opportunity to move to Buenos Aires to work with his father and brother, but shortly afterwards was again arrested for felony robbery; iii) in the course of his detention he was transferred to an "open" institution, and on the day of the transfer he absconded and was subsequently arrested for an attempted robbery; iv) in April 2000 he was handed over to his mother, who assumed her parental responsibility, and in 2001, when he had already reach the age of criminal responsibility (16 years) and the juvenile supervision treatment proceedings had been unified by the Juvenile Court, he was again arrested for a felony robbery involving murder; v) he was again given temporary release for family visits; work releases were implemented but the benefit thereof was interrupted as he failed to return from one of the releases; vi) the Social Secretariat, after conducting several psychological interviews with the alleged victim, believed that he displayed an unfavorable social outlook; and vii) during all this treatment he was

accompanied by psychologists and social workers and, despite this, continued his winding path littered with violence and disregard for others.

6. Similarly, the State indicates that the Chamber of Appeals also carried out a comprehensive analysis of the evidence in the proceedings to decide whether it had jurisdiction to impose a penalty and its scale. In that sense, the Chamber considered that: i) the exemption from the custodial sentence is the exception and not the rule; ii) the offenses for which he was found guilty were committed with the use of a firearm; iii) his criminal record showed a compulsion to commit offenses that only ceased when he was deprived of his liberty; iv) that he had squandered all the opportunities given him by the authorities; and v) the seriousness and modality of the crimes, their repetition over time and the alleged victim's background.

7. In light of the above, the State maintains that the judicial authorities acted in accordance with the applicable standards in juvenile justice, and always took the alleged victim's circumstances into account, including his age, and did not subject him to a disproportionate penalty, but rather fixed a penalty closer to the minimum applicable for his offenses.

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

8. Both parties agree that in the year 2003, the alleged victim was convicted and sentenced to 13 years in prison and that both conviction and sentence were challenged through: i) an appeal that was decided on July 30, 2004; ii) a constitutionality appeal decided on November 9, 2004; iii) a complaint motion decided on April 20, 2005; iv) an extraordinary federal appeal resolved on June 1, 2006; and v) an appeal motion for denial of the extraordinary federal appeal. The last appeal motion was decided by the National Supreme Court of Justice on September 18, 2007, and the decision was served on the alleged victim on September 25, 2007.

9. The State, on the one hand, indicates that domestic remedies failed to challenge the constitutionality of Law 22,278 or its compatibility with the American Convention and that this section of the petition must be declared inadmissible. On the other hand, it argues that after the judgment of second instance, the extraordinary appeals filed by the alleged victim to challenge the scale of the sentence were incorrectly exhausted. In this regard, it indicates that in order to challenge the unconstitutionality of a decision or rule, the alleged victim should have reserved his right to file unconstitutionality arguments before a higher court at all instances of the proceedings. The State points out that in the instant case the alleged victim failed to make this reservation and it was only during the unconstitutionality appeal that he argued for the first time that the increase of the sentence at second instance had violated his right to access a double instance review. As a result of this procedural defect, this appeal, as well as the successive ones, were declared inadmissible.

10. In turn, the petitioner points out that the incompatibility of this rule with the Convention was raised in the constitutionality appeal and in the extraordinary federal appeal, and that in any case the national authorities had the duty to carry out *ex officio* the conventionality control as party of the State's duty of guarantee in accordance with Article 1.1. of the American Convention. On the other hand, in relation to the alleged failure to exhaust domestic remedies, it indicates that after the second instance court had increased the sentence, there was no ordinary appeal permitting an integral review of this decision. In the light of the foregoing, and given that it was the only available remedy, the alleged victim filed an unconstitutionality appeal. This appeal is exceptional and has a restrictive nature and cannot be considered as suitable and effective in light of applicable international standards. In addition, it indicates that, although he previously failed to make reservation for the federal case, he raised the existence of "surprising arbitrariness" due to the impossibility of having foreseen the arbitrariness alleged in the unconstitutionality appeal, since this had only occurred at second instance. Finally, it argues that the successive appeals were rejected not because the unconstitutionality remedy had allegedly been exhausted, but rather because of the limited scope of these appeals.

11. In relation to the alleged failure to exhaust domestic remedies, the IACHR considers that the alleged victim was not obliged to argue, with the specificity suggested by the State, the alleged incompatibility of Law 22,278 with the American Convention given the allegations in proceedings: i) that the State had failed to act in accordance with its international obligations and had violated the human rights of the alleged victim; and ii) that the conviction and sentence of the alleged victim had been decided in breach of international standards. Therefore, when analyzing the appeals filed by the alleged victim, the State was aware of these claims and had the opportunity to remedy the alleged violations.

12. With regard to the extraordinary appeals, the IACHR agrees that these are restrictive in nature. In this regard, the IACHR observes that the unconstitutionality appeal filed by the alleged victim was declared inadmissible on the grounds that the alleged arbitrariness of his increased sentence had not been questioned at a time when an increase in the sentence had not yet been imposed. Therefore, there was a requirement to question an event that had not yet occurred. In these circumstances, the absence of a relevant federal case reservation, contrary to the State's views, does not demonstrate a failure to exhaust a remedy, but demonstrates the exceptional and restrictive nature thereof. In addition, the IACHR observes that the remedies filed after this decision, contrary to the State's allegations, were not declared inadmissible because of the unconstitutionality motion's formal defects, but rather based on the discretion of the courts in admitting these appeals. In view of the foregoing, the IACHR considers not only is the exhaustion of extraordinary remedies unnecessary, but also considers that it is appropriate to take these remedies into account – as the alleged victim points out that he filed them as the only ones available to him - and that they were exhausted on September 25, 2007, the date on which the alleged victim was served with the decision of the National Supreme Court of Justice. Therefore, and bearing in mind that the petition was filed on March 19, 2008, it fulfills the requirements of Articles 46(1)(a) and 46(1)(b) of the American Convention.

13. The Inter-American Commission acknowledges the State's claim regarding what it describes or qualifies as the tardiness in transmitting the petition, but the Commission reiterates that neither the Convention nor the Commission's Rules of Procedure establish a deadline for the transfer of a petition to the State upon receipt and that timeliness requirements established in the Rules of Procedure and in the Convention for other procedural stages are not applicable by analogy.

## VII. ANALYSIS OF COLORABLE CLAIM

14. The petitioner maintains that the State is responsible for the violation of the alleged victim's human rights.<sup>4</sup> In turn, the State argues that the facts alleged do not characterize violations of human rights, that the judicial authorities have acted in accordance with the guarantees of due process and international standards, that the punishment imposed upon the alleged victim is not disproportionate and therefore does not constitute cruel, inhuman and degrading treatment, and that the alleged victim is resorting to the IACHR as a court of fourth instance because of his disagreement with the outcome of domestic proceedings.

15. With respect to the State's arguments regarding the fourth-instance formula, the IACHR acknowledges that it is not competent to review the judgments handed down by national courts acting within their sphere of competence and applying due process and judicial guarantees. However, it reiterates that, within the framework of its mandate, it is competent to declare a petition admissible and to rule on the merits when it refers to domestic proceedings that could be in violation of rights guaranteed by the American Convention.

16. In light of this, the IACHR considers that the petition is not manifestly unfounded and, at the merits stage, will examine the judicial proceedings and the Argentine legislation in order to determine whether the alleged facts, if proven, could constitute violations of the rights enshrined in Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 19 (rights of the child) and 25 (judicial protection) of the Convention in accordance with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) of the same instrument.

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<sup>4</sup> See the rights invoked in Section 1 of the present Report.

## VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 7, 8, 19, and 25 of the Convention in relation to Articles 1.1 and 2 of the same instrument; 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 7<sup>th</sup> day of the month of June, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarette May Macaulay, Francisco José Eguiguren Praeli, Luis Ernesto Vargas Silva and Flávia Piovesan, Commissioners.