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REPORT No. 132/18
PETITION 1225-12
REPORT ON ADMISSIBILITY

OCTAVIO ROMERO AND GABRIEL GERSBACH
ARGENTINA

Approved electronically by the Commission on November 20, 2018.

Cite as: IACHR, Report No. 132/18. Petition 1225-12. Admissibility. Octavio Romero and Gabriel Gersbach. Argentina. November 20, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Gabriel Gersbach, CHA (Argentine Homosexual Community), ACIJ (Civil Association for equality and Justice)
Alleged victim:	Octavio Romero and Gabriel Gersbach
Respondent State:	Argentina
Rights invoked:	Article 4 (life), 5 (humane treatment), 8 (fair trial), 24 (equal protection) and 25 (judicial protection) of the American Convention on Human Rights, in connection with Article 1.1 thereof (obligation to respect rights); Article I (life, liberty and personal security), II (equality before the law) and XVIII (fair trial) of the American Declaration of the Rights and Duties of Man; and other international treaties ¹

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition:	June 26, 2012
Notification of the petition to the State:	September 24, 2013
State's first response:	November 20, 2015
Additional observations from the petitioner:	November 4, 2016
Additional observations from the State:	July 17, 2018

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 September 5, 1984)

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 4 (life), 5 (humane treatment), 8 (fair trial), 13 (freedom of thought and expression), 24 (equal protection) and 25 (judicial protection) of the American Convention on Human Rights, in connection with Article 1.1 thereof (obligation to respect rights)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, the exception of Article 46.2.c of the Convention is applicable
Timeliness of the petition:	Yes, pursuant to section VI

¹ Articles 6, 7 and 14.1 of the International Covenant on Civil and Political Rights; and Article 3 of the Universal Declaration of Human Rights.

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

V. ALLEGED FACTS

1. The petitioners allege deprivation of the life of Octavio Romero, an officer of Argentina's coastguard and river police force, based on his sexual orientation, and allege a failure to investigate with due diligence. They contend that Octavio Romero was last seen alive on June 11, 2011. They claim that Romero left his house that day to meet with friends but never made it to the gathering. The petitioners assert that on the following day, Gabriel Gersbach, Octavio Romero's life partner with whom he lived in the city of Buenos Aires, reported his disappearance to Sectional Office No. 15 of the Argentine Federal Police. They note that on June 17, 2011 the naked and lifeless body of Octavio Romero was found floating at the intersection of Av. San Martin and the Rio de la Plata (silver river), the jurisdiction of the Argentina's coastguard and river police force. They contend that according to the autopsy subsequently performed on him, the cause of death had been "asphyxiation from submersion, after being knocked unconscious from being beaten and thrown into the water."

2. The petitioners claim that the alleged victim was a First Class Non-Commissioned Officer for 13 years at the Argentine Naval Prefecture. They argue that prior to these events, he began to file the paperwork to wed his partner in December of that year and, in so doing, was to become "the first uniformed man to enter into a same sex marriage in Argentina." They note that pursuant to the rules in effect at the time, the alleged victim had requested permission to marry. They claim that after making his sexual orientation public at his workplace, the alleged victim was subjected to mockery and harassment. They further contend that based on statements of some of his co-workers, the chiefs of the Prefecture had asked him to not wear the official uniform at the wedding ceremony. In these circumstances, the petitioners contend that there is sufficient evidence to find that Octavio Romero was the victim of an act of violence that caused his death, including perhaps torture, and that these crimes were motivated by his sexual preference.

3. Concerning the investigation proceedings, the petitioners claim that on two occasions, September 23, 2011 and May 29, 2012, Gabriel Gersbach filed a motion to become a plaintiff in the case investigation into the murder of Octavio Romero, and that these motions were denied on the grounds that he was considered a suspect in the investigation. They allege that during this period Mr. Gersbach was not allowed access to the case file or to know the reasons why he was considered a suspect in the investigation. According to information confirmed by the State, on July 12, 2012, the National Appeals Chamber for Criminal and Correctional Matters overturned the decision and ruled that Mr. Gersbach is considered a plaintiff. In this regard, the petitioners allege that there was an arbitrary and discriminatory infringement of Gabriel Gersbach's right to be a plaintiff, to participate and be heard during the first year of the investigation.

4. With respect to the investigation, the petitioners also claim that the Office of the Public Prosecutor has not pursued lines of investigation, which take into account that the crime may have been motivated by the sexual orientation of the victim, or the possible participation of members of the Prefecture in the crime. In this regard, they contend that on October 1, 2015, the Public Prosecutor's Office and a journalist received an anonymous report that contained detailed information about the facts, claiming that the murder was perpetrated by members of the Prefecture to prevent the first same sex marriage of the staff of that security force from taking place. They claim that the report indicates that all information relating to the crime is stored on a hidden disc in one of the buildings of the Prefecture.

5. The petitioners contend that both the Prosecutor's Office and the plaintiff requested that a search be conducted in order to find this device, but the Judge overseeing the case denied the request on the grounds that the report lacked credibility. They claim that they filed motions challenging this decision, which were denied, until November 10, 2015, when the Chamber of Appeals for Criminal and Correctional Matters approved the request on the grounds that "the information warrants attention." According to information corroborated by the State, the search was conducted in December of the same year and no device was found. The petitioners contend that the delay in taking this urgent measure hampered the ability to obtain the evidence and that other evidence gathering steps were not taken to establish the veracity of the information contained in the anonymous report. Based on the foregoing, they allege that the State has not acted with the due diligence required and, therefore, even though the investigation file is formally still open, as of 2016 more than five years had elapsed and no perpetrator of the crime has been identified nor are the circumstances in

which the events took place known with certainty. They decry that “a discriminatory attitude based on the sexual orientation of the couple consisting of Octavio Romero and Gabriel Gersbach” further complicates the foregoing situation.

6. The State, in response, claims that according to the lead Prosecuting Attorney, since the time when the inquiry was opened, all criminal hypothesis have been investigated, not only those relating to the romantic life of Octavio Romero, but also those relating to his workplace, and that every individual who could provide information about the events were called to provide statements.

7. It further contends that the petition must be found inadmissible. It argues that domestic remedies have not been pursued and exhausted because the homicide of Octavio Romero is in the middle of the investigation stage in the context of which evidence collection measures are being taken. It claims that Gabriel Gersbach was added as a plaintiff in July 2012, after it was proven that he was not linked to the crime. It asserts that in this capacity, Gersbach has requested several exhibits that have been introduced by the Public Prosecutor’s Office and are in the process of being produced and no discrimination could be detected. Lastly, it argues that the petitioners’ allegations do not involve any facts that would tend to establish a violation of the rights of the alleged victims, as recognized in the American Convention and that it is clear that the instant case involves an attempt to have the IACHR review the investigations that are currently being conducted by local magistrates.

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

8. The petitioners allege that there has been an unwarranted delay in the investigation of the facts by the State and that Mr. Gersbach was prevented from exhausting domestic remedies when he was not accepted as a plaintiff to the case at the start of the investigation proceedings. In response, the State claims that “the petitioners have had and have access to domestic remedies, which were ruled upon and/or will be ruled upon at the proper time by the administrative authorities and impartial and independent tribunals,” but that the remedies have not been exhausted.

9. As can be gleaned from the case file, 7 years after the alleged acts took place there are no indications of any progress in the investigation proceedings of the instant case, the circumstances in which the events took place or the persons who may be responsible have not been determined. In view of the foregoing, the Commission concludes that the exception to the exhaustion rule set forth in Article 46.2 of the Convention is applicable, with the proviso that the causes and effects that have prevented exhaustion of domestic remedies in the instant case will be examined, as appropriate, in the report on the merits adopted by the Commission, in order to ascertain whether or not the facts actually constitute violations of the ACHR. The Commission also finds that precluding Mr. Gersbach from becoming a plaintiff during the first year of the investigation is a matter that must be examined in the merits stage.

10. The Commission notes that the petition was received on June 26, 2012, the facts that are the subject of the claim took place on June 11, 2011, and the effects of the alleged denial of justice would extend to the present time. Therefore, based on the particulars of the instant case, the Commission finds that the petition was lodged within a reasonable period of time and that the requirement of admissibility pertaining to timeliness of the filing has been met.

VII. EXAMINATION OF COLORABLE CLAIM OF THE ALLEGED FACTS

11. Based on the elements of fact and law submitted by the parties and the nature of the matter brought before it, the Commission finds that, should the alleged facts be proven as to unwarranted delay and lack of due diligence in the investigation, they could tend to establish violations of Article 4 (life), 5 (humane treatment), 5 (judicial protection), 8 (fair trial rights), 13 (freedom of thought and expression) and 25 (judicial protection) of the American Convention on Human Rights in connection with Article 1.1 thereof (obligation to respect rights), to the detriment of Octavio Romero. Additionally, the facts described and the authorities’ alleged discriminatory attitude toward Gabriel Gersbach in not granting his motion to become a

plaintiff during the first year of the investigation could tend to establish violations of Article 8 (fair trial rights), 24 (equal protection) and 25 (judicial protection) of the American Convention with respect to Gabriel Gersbach.

12. As to the claim of the alleged violation of Article I (life, liberty and personal security), II (equality before the law) and XVIII (fair trial) of the American Declaration of the Rights and Duties of Man, the Commission reiterates that once the American Convention comes into force with relation to a State, the Convention and not the Declaration becomes the primary source of law to be applied by the Commission, provided that in the petition, violations of substantially identical rights enshrined in the two instruments are alleged, as is the case in the instant matter.

13. Furthermore, with regard to the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, the Commission is not competent to establish violations of the provisions of said treaties, though it may take them into account in interpreting the provisions of the American Convention during the merits stage of the instant case, as provided for in Article 29 of the Convention.

VIII. DECISION

1. To declare the instant petition admissible with regard to Articles 4, 5, 8, 13, 24 and 25 of the American Convention, in connection with Article 1.1 thereof; and

2. To notify the parties of the instant decision; proceed to the examination of the merits of the matter; 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 20th day of the month of November, 2018. (Signed): Margarette 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, Antonia Urrejola, and Flávia Piovesan, Commissioners.