

Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 72/03; Petition 12.159
Session:	Hundred and Eighteenth Regular Session (7 – 24 October 2003)
Title/Style of Cause:	Gabriel Egisto Santillan v. Argentina
Doc. Type:	Decision
Decided by:	President: Jose Zalaquett; First Vice-President: Clare K. Roberts; Second Vice-President: Susana Villaran; Commissioners: Robert K. Goldman, Julio Prado Vallejo. In accordance with Article 17(2)(a) of the Commission's Rules of Procedure, Commission Member Juan E. Mendez, an Argentine national, did not take part in the discussion or the decision on the instant case.
Dated:	22 October 2003
Citation:	Egisto Santillan v. Argentina, Petition 12.159, Inter-Am. C.H.R., Report No. 72/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003)
Represented by:	APPLICANT: the "Committee of Relatives of Defenseless Victims of Social Unrest of the Argentine Republic (COFAVI)"
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I. SUMMARY

1. On January 29, 1999 the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission", the "Commission" or "the IACHR") received a petition presented by the "Committee of Relatives of Defenseless Victims of Social Unrest of the Argentine Republic (COFAVI)" (hereinafter "the petitioners"), against the Republic of Argentina (hereinafter "the State", "the Government" or "Argentina"). The petition concerns the death of Gabriel Egisto Santillán Reigas, aged 15, on December 8, 1991 as a result of a bullet wound he received on December 3, 1991 in circumstances in which members of the Police of the Province of Buenos Aires were in pursuit of unidentified individuals suspected of the theft of a vehicle. Further, the petition concerns the alleged denial of judicial protection and a fair trial owing to lack of due diligence in the proceeding to investigate the facts and punish the persons responsible for the death of Santillán.

2. The petitioners affirm that the State is responsible for the violation of the rights to life, humane treatment, a fair trial and judicial protection, in conjunction with the general obligation to respect and ensure rights, enshrined in Articles 4, 5, 8, 25 and 1(1), respectively, of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention"), to the detriment of Gabriel Egisto Santillán Reigas (hereinafter "the victim"), as well as the subsequent denial of justice to the detriment of his relatives.

3. The State requested that the Commission declare the petition inadmissible for failure to exhaust the remedies allegedly available under domestic law, and further, because in its evaluation the facts alleged in the petition did not tend to establish violations of the rights protected by the Convention.

4. The Commission concludes in the instant report, without prejudging the merits of the case, that the petition is admissible in accordance with Articles 46 and 47 of the Convention, and that it will continue with its analysis in respect of the alleged violations of Articles 4, 5, 8, 19, 25 and 1(1) of that instrument.

II. PROCESSING BY THE COMMISSION

5. The Commission informed the petitioners of the initiation of proceedings and sent the pertinent portions of the petition to the State by a communication of June 7, 1999, granting the Government 90 days to provide the information that it deemed relevant with regard to the allegations contained in the petition and exhaustion of remedies under domestic law. On September 7, 1999, the State requested an initial extension of the deadline to submit relevant information. In a note of September 13, 1999, the Commission granted the State another 60 days, and advised the petitioners of that decision. Subsequently, in a communication dated November 11, 1999, the State requested a further extension in order to comply with the request for information. By note of November 15, 1999, it was given a further 30 days and that decision was also communicated to the petitioners.

6. The Government submitted its reply to the petition by communication of December 16, 1999, the pertinent parts of which were forwarded to the petitioners on December 21, 1999 with the request that they submit such observations as they deemed appropriate to the reply of the State within 60 days.

7. On March 3, 2000 the petitioners sent their observations on the reply of the State, which were transmitted to the Government by a communication dated May 19, 2000, giving it 60 days to send additional information or observations on the petitioners' brief.

8. In a communication of July 21, 2000, the State requested an extension to formulate its observations. An extension of 30 days was granted on August 22, 2000, and the petitioners were notified accordingly. Subsequently, by note of September 25, 2000, the State requested another extension to submit its comments. The Commission granted it another 30 days on September 29, 2000, and advised the petitioners of its decision.

9. The State presented its comments on the brief containing the observations of the petitioners on January 9, 2001. The Commission transmitted the contents of this second brief of the State to the petitioners via a communication dated January 11, 2001, granting them 60 days to present observations thereon or to provide additional information. On January 21, 2001, the petitioners requested an extension to present their reply. The Commission granted the petitioners an additional 45 days in a letter of February 14, 2001. On March 7, 2001, the petitioners requested a second extension to submit their observations, which was granted to them via a note dated April 23, 2001. The State was informed accordingly.

10. In the interim the Commission received another communication from the State in which it furnished additional information relating to the case, the pertinent parts of which were transmitted to the petitioners by a note of March 26, 2001.

11. The petitioners sent their observations to the new brief of the Government by note of July 9, 2001. The contents of that note were brought to the attention of the State by note of August 20, 2001, and it was given one month in which to present its reply.

12. The State sent the Commission additional information and observations by a communication of October 22, 2001. That communication was forwarded to the petitioners on October 29, 2001, and they were given one month to submit their comments. In a communication of December 7, 2001, the petitioners sought an extension of the deadline to present their comments. By means of a communication of January 17, 2002 they were granted 30 days.

13. The petitioners replied to the earlier brief of the State in a note of January 22, 2002 and put forward additional information on the case in a letter dated June 12, 2002. The Commission transmitted the pertinent portions of those communications to the Government on August 8, 2003 and granted it 30 days to submit observations.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

14. The petitioners claim that the State is responsible for the death of Gabriel Santillán, as a result of the bullet wound he received in circumstances in which members of the Police of the Province of Buenos Aires were in pursuit of unidentified individuals suspected of the theft of a vehicle. They affirm that Argentina has failed its duty to investigate, punish those responsible, and provide adequate reparation for this homicide, and has consequently denied justice to the family of the victim.

15. They report that on the morning of Tuesday, December 3, 1991 an automobile owned by Mr. Carlos María Libois was stolen by two unidentified individuals outside his house on Calle Goffins N° 339 in Morón District, Buenos Aires Province. The thieves then escaped in the vehicle.

16. At approximately 12:20 p.m., Police Officers Jorge Norberto Prado and Marcelo Luis Altamirano of the Third Precinct, Parque San Martín de Merlo, Buenos Aires Police, who were proceeding along Avenida Echeverry in Merlo District, Buenos Aires Province, intercepted the vehicle stolen that morning from Mr. Libois. Considering the occupants of the vehicle suspicious, the officers ordered them to stop in order to identify them. However, instead of complying with the police order, the vehicle carrying the suspected thieves increased speed and turned abruptly into Calle Martín Rodríguez. At that moment, Officer Prado descended from his motorcycle and opened fire on the suspects, and a shootout ensued. For his part, Corporal 1st Class Altamirano pursued them on his motorcycle along Calle Martín Rodríguez for more than

30 blocks, but was unable to catch them. As a result, the individuals in question have never been identified.

17. According to the petition, Gabriel Egisto Santillán was walking home along Avenida Echeverri at that time, and had started to cross the intersection of Avenida Echeverri and Calle Martín Rodríguez when he was struck by one of the bullets fired by the police and fell, seriously injured, onto a pile of rubble.

18. The petitioners indicate that Officer Prado stayed in the vicinity preventing curious bystanders from approaching the wounded youth. They add that a few minutes later Mr. Rubén Raúl López, Gabriel Santillán's stepfather, arrived, having been alerted to the incident by neighbors in the area. With the help of Ruben Ferraro (a policeman who happened to be in the area), he stopped a No. 136 bus and with it took the wounded youth to Eva Perón Municipal Hospital in Merlo District.

19. The victim remained at the hospital for a number of hours, and received first aid including the drainage of both lungs. However, due to the complexity of his injury he was transferred to "Profesor Luis Güemes" Inter-zonal General Hospital for Acute Cases in the Haedo area of Morón District, Buenos Aires Province, where he was diagnosed as suffering from a gunshot injury, with the entry wound in the right shoulder and the exit wound in the left axilla, as well as bilateral pulmonary contusion, pneumothorax, and paraplegia caused by a traumatic lesion to the spine. The young Santillán was hospitalized for five days in an extremely serious condition.

20. According to the petitioners, on Saturday, December 8, 1991, at approximately 9:30 p.m., Gabriel Egisto Santillán died as a result of the injury he received on December 3, 1991.

21. The petitioners consider that the police officer employed excessive force in the way he used his weapon, bearing in mind that Avenida Echeverri is a commercial area and is often crowded with passersby. In the vicinity there is also a school, and the incident occurred precisely at the time that the students were leaving. In sum, they consider that the means used by the Police of the Province of Buenos Aires in response to the escape of the suspected thieves were completely disproportionate.

22. The petition alleges that the victim's stepfather overheard how Officer Jorge Norberto Prado told policeman Rubén Ferraro that he fired off every round in the cartridge of his weapon and that the youth Santillán acted as a shield; however Ferraro was unable to say who uttered the latter comment.

23. The petitioners report that a criminal proceeding entitled "Perpetration of Crime and resisting authority. Homicide. Assault with arms. Automobile theft and discovery of the automobile. Victim: Gabriel Egisto Santillán N° 23.148/91", was instituted before the Fifth Court of First Instance for Criminal and Correctional Matters in and for Morón Judicial District to investigate the incident.

24. According to the petitioners, the Police committed gross negligence in collecting the material evidence of the incident since it was not until 3:00 p.m. that an officer from Morón Technical and Judicial Investigations Office appeared at the scene to collect evidence. That procedure proved futile because the scene had not been sealed off to the public after the shootout; therefore, several curious members of the public, including children, removed important evidence for solving the case from the scene.[FN1]

[FN1] For example, the witness Alejandro González Díaz, who was 13 years old at the time of the incident, said he had taken a cartridge casing from the scene.

25. The petitioners indicate that, on the day of the incident, a ballistic test was performed on the service weapon of Officer Prado (a Browning 9 millimeter pistol) and three expended cartridge cases found at the scene. The results showed that the cartridge cases were discharged by Officer Prado's weapon.

26. The petition alleges that the medical examinations of the Gabriel Santillán's body were seriously flawed and helped to allow the killing to remain in impunity. The petitioners explain that owing to uncertainty as to which was the entry wound of the projectile and which was the exit wound (due to contradictions between the clinical history at the hospital in Haedo and the autopsy report), the Judge of First Instance for Criminal Matters ordered a second autopsy, and the corpse was exhumed on December 19, 1991, without the knowledge or participation of the family. The second autopsy was carried out that very day and skin and blood samples, as well as the heart and lungs of the corpse, were taken for anatomicopathological tests. These items were sent to the Judicial Forensic Service of the Province of Buenos Aires.

27. The petition explains that, at approximately 8:30 a.m. on December 20, 1991, the Morón radio patrol car which was ferrying the samples from the body of Gabriel Santillán to the judicial morgue in La Plata collided with another vehicle. The incident delayed the delivery of the items. For that reason, when they finally reached the Forensic Service, they were not received because office hours were over. According to the petition, the personnel entrusted with the custody of these items was instructed to return the following day, Saturday, December 21, 1991. At 12:00 p.m. on the day in question, officers from the Morón Regional Unit of the Buenos Aires Police allegedly tried again to deliver the samples from the corpse, but without success, because there were no guards at the criminal area of the Forensic Service. The petitioners say that the police officers decided to keep the samples in a refrigerator at Morón 1st Regional Unit until Monday, December 23, 1991. The samples were finally delivered to the Forensic Service on December 23, 1991.

28. The petition says that on January 14, 1992 the anatomical pathologist of the Forensic Services Bureau of the Judicial Branch of the Province of Buenos Aires reported that the exhibits received were inadequate for carrying out the orders of the Court (determine the entry and exit wounds of the projectile that caused the death of the young Santillán) because the skin fragments had dried out in advance and the lungs were in an advanced state of decomposition, due to lack

of precautions for the conservation of the samples after they were taken from the corpse, which prevented the determination of the existence of traumatic lesions.

29. According to the petitioners, on the day the victim died policeman Rubén Ferraro asked the victim's maternal grandmother, Lidia Haydee Basiglio, to hand over the clothes that the Santillán youth was wearing at the time of the incident, otherwise the body would not be released to them. They further claim that Officer Ferraro allegedly threatened the victim's mother on June 6, 1992, and that he allegedly intimidated her by calling on several of his colleagues to appear at the family's home displaying firearms. They explain that Officer Ferraro, who helped the victim's stepfather to take the injured youth to hospital, denied during the judicial proceeding that he had been present in the medical center or had conversed there with Officer Jorge Prado.

30. The petitioners say that on September 15, 1993, the Fifth Court for Criminal and Correctional Matters for the Morón Judicial District ordered the provisional dismissal of the case, finding that the death of Gabriel Santillán was the result of the shots fired by the thieves, not by the police—a conclusion unsupported by the evidence. The prosecutor appealed the decision, apparently because he considered, based on what little medical evidence there was in the case, that the death of the victim was caused by the shots discharged by Officer Jorge Norberto Prado. Prado's testimony was never taken during the proceeding, despite the insistence of the Santillán Reigas family. On February 8, 1994 the Chamber of Appeals for Criminal and Correctional Matters for the Morón Judicial District confirmed the decision of the lower court. The petitioners say that on June 16, 1994 the case was closed without the reopening of the investigation as is required when a dismissal is provisional.

31. In their last submission, the petitioners informed the Commission that, by interlocutory order of May 29, 2001, the 2nd Transitional Court for the Morón Judicial District, currently in charge of the proceedings, approved the destruction of the court record in February 2004, to which end it declared the case to be at a standstill and ordered its transfer to the District Archive.

32. The petitioners maintain that the petition meets the admissibility requirements contained in the American Convention and in the Commission's Rules of Procedure. They indicate that the relatives of the victim were unable to clarify the facts denounced in the petition through the courts because the competent authorities did not conduct an adequate investigation, thereby preventing punishment of those responsible and payment of the appropriate compensation, in spite of the fact that more than seven years passed between the incident and the lodging of the petition. Accordingly they invoke the exception provided in Article 46(2)(c) of the Convention.

B. Position of the State

33. The State, for its part, denies that the participation of the police officers in the incident that resulted in the death of the young Santillán was adequately demonstrated in the court proceeding. It also denies that, through its judicial officials, it has breached its obligation to investigate, punish those responsible, and provide reparation for the events that resulted in the death in question.

34. It considers that it has met its obligations by providing care for the victim at public hospitals until the time of his death, and by having investigated the facts, performed forensic tests, summoned witnesses, etc., in order to determine who perpetrated the deed. It mentions that the family of the victim was able to intervene in the judicial proceeding and that their attorneys also want the State to pay their fees for their professional activities in the domestic jurisdiction.

35. The State contends that the inability to recover the projectile that caused the injury impeded determining whether the bullet came from one of the firearms of the thieves or from the weapon of the policeman concerned. Furthermore, it mentions that the decision to refrain from taking the testimony of Officer José Norberto Prado is rooted in the lack of evidence surrounding the movements of the victim in the moments leading up to the shooting.

36. The State affirms that, in provisionally dismissing Case 23.148/91, it has not violated its obligations under Articles 4, 5, 8, and 25 of the American Convention, unless the intention is that agents of the State are deemed to lack the guarantees granted by Articles 8 and 25 of the Convention when they are involved in an incident such as the one at issue. It indicates that the case is archived pending new evidence, which could be contributed by one of the affected parties or come to light because the thieves involved in the shootout are apprehended.

37. The State explains that the dismissal of the court case was ordered in light of a situation of objective doubt or insufficient evidence as to who perpetrated the crime. That decision is not final for the purposes of special appeals; rather, it is considered an interlocutory order that does not prevent reopening the case. The State notes its protest as to the presentation in this proceeding of evidence that it alleges was not heard in the domestic jurisdiction.

38. The reply of the State mentions that the witnesses who testified in the judicial proceeding agreed on the fact that the young Santillán was injured by one of the shots fired by the alleged thieves, and that he immediately received first aid from one of the police officers involved (Jorge Norberto Prado), who took him to hospital, while another police officer pursued the wrongdoers on his motorcycle. The State further asserts that the investigation into the death of the young Santillán showed that the bullet that entered his body and caused his death did not come from the weapons of the police.

39. In the opinion of the State, limitations on the use of force by the police do not imply that law enforcement agents should allow assailants to attack them without defending themselves or repelling fire, bearing in mind the intervening circumstances. It maintains that, in the instant case, the thieves fired at the police officers, who were therefore forced to defend themselves.

40. In the opinion of the State, there has not been an unwarranted delay in the administration of justice in this matter because the investigation was unable to proceed further due to lack of evidence of responsibility. Therefore, it considers that the exception invoked by the petitioners to the rule of prior exhaustion of domestic remedies provided in Article 46(2)(c) of the Convention does not apply. The State argues that to claim an unwarranted delay of justice or a breach of the obligation to investigate whenever the author of a crime is not identified exceeds what the member states agreed to when they signed the Convention, because investigation is an obligation of means not of results.

41. The State considers that the Commission should declare the petition inadmissible because the petitioners have not exhausted the remedies available under domestic law, inasmuch as they did not request the reopening of the case and the taking of the testimonies that they now present to the Commission.[FN2] The Government further indicates that the petitioners' request for the establishment of compensatory damages in favor of the relatives of the victim as a result of the alleged violations is premature and completely unfounded because the remedies under domestic law in connection with the aforesaid complaint have not been exhausted.

[FN2] The testimonies to which the State refers in its reply to the petition are those of the victim's mother and stepfather, Marta Liliana Reigas and Rubén Raúl López, who, according to the copy of the court record forwarded by the Government, submitted their testimonies in the preliminary investigation phase of the domestic proceeding on June 22, 1992.

42. The State concludes its reply by indicating that, on the other hand, remedies have been exhausted as regards clearing the incriminated police officers of criminal wrongdoing. Therefore, those officers are protected by the principle of non bis in idem.

43. In its third observations brief, the State reports that the judicial investigation was closed on February 8, 1994 with the decision delivered by the Chamber of Appeals. Accordingly, the petition is extemporaneous. Furthermore, the petition seeks the review of matters already examined before the domestic courts; accordingly, the principle of the so-called "fourth instance formula" is applicable.

IV. ANALYSIS

A. The Commission's competence *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

44. The petitioners are entitled, in principle, under Article 44 of the American Convention to lodge petitions with the Commission. The petition names as alleged victims individuals in respect of whom the State undertook to observe and ensure the rights enshrined in the American Convention. As to the State, the Commission notes that Argentina has been a State party to the Convention since September 5, 1984, the date on which it deposited its instrument of ratification. Therefore, the Commission has competence *ratione personae* to examine the petition.

45. The Commission has competence *ratione loci* to hear the petition, since it alleges violations of rights protected by the American Convention occurring within the territory of a State party thereto. The IACHR has competence *ratione temporis* inasmuch as the duty to respect and ensure the rights protected in the American Convention was in force for the State at the time the violations alleged in the petition are said to have occurred. Finally the Commission has competence *ratione materiae* because the petition alleges violations of human rights protected by the American Convention.

B. Admissibility requirements

a. Exhaustion of domestic remedies

46. Article 46(1)(a) of the American Convention provides that admission of a petition shall be subject to the requirement “that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.”[FN3] Both the Inter-American Court of Human Rights (hereinafter “the Court” or “the Inter-American Court”) and the Commission have reiterated that “(...)under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means. [FN4] Nevertheless, the Convention provides the possibility that this provision shall not apply when domestic remedies are not available for reasons of fact or law. More specifically, Article 46(2) sets out exceptions to the general principle of exhaustion of domestic remedies when the domestic legislation of the state concerned does not afford due guarantees for the protection of the right or rights that have allegedly been violated; if the party alleging violation of his rights has been denied access to the remedies under domestic law; or there has been unwarranted delay in the resolution of the matter.

[FN3] See Inter-Am. Ct. H.R., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46 (2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, (Ser. A) No. 11 (1990), paragraph 17.

[FN4] See Inter-Am. Ct. H.R., Decision in the Matter of Viviana Gallardo et al., November 13, 1981, Ser. A N° G 101/81, paragraph 26.

47. In the instant matter, on September 15, 1993 the Fifth Court of First Instance for Criminal and Correctional Matters for the Morón Judicial District, Buenos Aires Province, provisionally dismissed Case No. 23.148/91 entitled "Perpetration of Crime and resisting authority. Homicide. Assault with arms. Automobile theft and discovery of the automobile. Victim: Gabriel Egisto Santillán" pursuant to Article 382(2) of the Code of Criminal Procedure of the Province of Buenos Aires in force at the time. This decision was confirmed in every respect on February 8, 1994, by the Third Chamber of the Chamber of Appeals for Criminal and Correctional Matters for the Morón Judicial District, Buenos Aires Province. The argument advanced to justify the dismissal was that there was insufficient evidence to determine who discharged the shot that caused the death of the young Gabriel Egisto Santillán Reigas.

48. From the documents furnished to the Commission by the parties it can be seen that the family of the victim presented information and evidence during the domestic judicial proceeding, and requested that procedures be carried out that, in their opinion, would have made it possible to determine the identity of the person who fired the shot that ended the life of the young Santillán. However, those requests, which included the taking of the testimony of Officer Jorge Norberto

Prado, a ballistic test on the weapon of Corporal 1st Class Altamirano, and the reconstruction of the events, were refused by the court.

49. In essence, what the State initially claimed was that the provisional dismissal was not a final decision, and therefore permitted the presentation of new evidence to demonstrate who fired the shot, with the reopening of the investigation of the facts. The petitioners failed to make use of this possibility, therefore the remedies available under domestic law have not been exhausted. Accordingly the petition should be found inadmissible. Later, the State said that the decision confirming the provisional dismissal closed the investigation of the facts. On that basis, the remedies under domestic law were exhausted in February of 1994, and therefore, it is not possible to speak of an unwarranted delay in the administration of justice to justify application of the exception provided in Article 46(2)(c) of the Convention and invoked by the petitioners. On this point, the Commission observes that the aforementioned positions are contradictory and, pursuant to the case law of the Court, when a party in a case, in this case the State, adopts a position that is either beneficial to it or detrimental to the other party, the principle of estoppel prevents it from subsequently assuming the contrary position.[FN5] Here the rule of non concedit venire contra factum proprium applies.[FN6]

[FN5] In international law, the principle of estoppel is a concept in evolution. Notwithstanding the wide variety of definitions in doctrine and practice, the following characteristics are generally accepted as its essential elements: 1) A situation created through the position attitude of a party, 2) Conduct followed by the other party based directly on that position, and 3) The impossibility that the party that adopted the initial position could argue or pronounce against it, even if this wouldn't produce detriment or prejudice to the other party. The typical effect of this doctrine is that it prohibits parties, independently of its truth or accuracy, from adopting different subsequent positions on the same issue. See Jorg Paul Muller and Thomas Cottier, Estoppel, in R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. II (1992), p. 116.

[FN6] Inter-Am. Ct. H.R., Neira Alegría et al. Case, Preliminary Objections, Judgment of December 11, 1991, Series C N° 13, paragraph 29.

50. For their part, the petitioners maintain that it was precisely the lack of due diligence and the excessive delay in the investigation process that denied them effective access to domestic remedies. In spite of that, they persisted with the proceeding, giving the State the opportunity to complete its investigation and punish those responsible, something that has yet to occur. According to them, the Attorney General's Office, in accordance with the criminal procedure laws in force, could have presented a challenge to the decision adopted by the Court of Appeals for Criminal and Correctional Matters, which also failed to occur. Finally, according to the petitioners, the State now intends to allow the incident to remain in complete impunity, as shown by the interlocutory order issued on May 29, 2001 by the 2nd Transitional Court for the Morón Judicial District, currently in charge of the proceedings, approving the future destruction of the court record in February 2004. To that end it declared the case to be paralyzed and ordered its transfer to the District Archive.

51. In the first place, the Commission considers that, in keeping with the majority of legislations in the hemisphere, the dismissal of a criminal proceeding is not a final decision, particularly since it is not conclusive or unappealable in nature in the domestic jurisdiction.

52. The Commission has indicated that, "In terms of the burden of proof with respect to the requirements of Article 46, it should be noted that, when a petitioner alleges that he or she is unable to prove exhaustion, Article 31 of the Commission's Rules of Procedure establishes that the burden then shifts to the State to demonstrate which specific domestic remedies remain to be exhausted and offer effective relief for the harm alleged. Where the State then makes a showing that a certain remedy should have been used, the burden shifts back to the petitioner to show that it was exhausted or that one of the exceptions under Article 46 applies." [FN7]

[FN7] IACHR, Report N°72/01 (Admissibility), Case 11.804, Juan Ángel Greco, Argentina, October 10, 2001, paragraph 46; Report N° 5/02 (Admissibility), Case 12.080, Sergio Schiavini et al., Argentina, February 27, 2002, paragraph 50. See also, for example, Inter-Am. Ct. H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, Ser. C N° 4, paragraphs 60 and 64.

53. As to the reopening of the investigation in criminal case 23.148/91, [FN8] the Commission observes that the State has not explained what the procedure was for the investigation to be reopened, as the petitioners had requested, and for it to be carried out effectively in accordance with the laws in force at the time in the Province of Buenos Aires, bearing in mind that with the passage of time physical and testimonial evidence becomes harder to come by and less reliable. Furthermore, the Commission should reiterate that whenever a crime is committed that can be prosecuted on the state's own initiative, the state has the duty to set in motion the criminal justice process and follow it through to its ultimate conclusion. In those cases, this is the appropriate way to clarify the facts, prosecute the persons responsible, and establish the corresponding criminal sanctions, in addition to making possible other forms of pecuniary reparation. [FN9] The relevant information and evidence in the instant case was in the possession of the State, which is the entity that has the powers to investigate.

[FN8] Which was expressly requested of the judge hearing the case by Mrs. Mirta Reigas, the victim's mother, in submissions dated December 22, 1997, December 4, 2000, and August 6, 2001.

[FN9] See, Report N° 52/97, Case 11.218, Argues Sequeira Mangas, Nicaragua, paragraphs 96 and 97; Report No. 57/00, Case 12.050, La Granja - Ituango, Colombia, October 2, 2000, paragraph 40.

54. The Commission considers that the facts asserted by the petitioners in this case involve the alleged violation of non-derogable fundamental rights, such as the rights to life and humane treatment, which under domestic law are offenses that can be prosecuted by the State on its own initiative, and that therefore it is this process, pushed forward by the State, that should be considered for the purposes of determining the admissibility of the claim. In such cases, it can

only be demanded that the petitioner exhaust domestic remedies where the State concerned investigates the facts alleged with due diligence and proceeds to punish any persons found responsible in accordance with its duties under both domestic law and the Convention.[FN10]

[FN10] See, for example, IACHR, Report N° 62/00, Case 11.727, Hernando Osorio Correa, Colombia (Admissibility), 2000 Annual Report of the IACHR, paragraph 24.

55. As a general rule, a criminal investigation should be undertaken with due diligence to protect the interests of the victims, to preserve the evidence, and even to safeguard the rights of all persons who may be considered suspects in the context of the investigation. As the Inter-American Court has indicated, while every criminal investigation should meet a series of legal requirements, the rule of prior exhaustion of domestic remedies should not lead to a situation in which international action on behalf of victims comes to a halt or is rendered ineffective.[FN11]

[FN11] Inter-Am. Ct. H.R., Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987, Ser. C N° 1, paragraph 93.

56. Moreover, the procedural status of the record in the domestic jurisdiction helps to demonstrate the ineffectiveness of the remedy whose exhaustion is demanded of the petitioners, inasmuch as the record, classified as at a standstill, has been ordered destroyed on February 8, 2004.[FN12] In other words, the judicial authorities have indicated that it is impossible to clarify the facts and punish those responsible, even though 11 years have passed since the incident, and in spite of many administrative petitions to organs of the executive and requests to the judicial authorities to reopen the case from the Santillán family. In such circumstances, the unwarranted delay in the administration of justice is grounds to invoke the exception provide by Article 46(2)(c) of the Convention.

[FN12] Article 84 of Accord N° 2212/87 issued by the Supreme Court of Justice of the Province of Buenos Aires on October 13, 1987 authorizes the destruction of paralyzed criminal cases.

57. Furthermore, it can be concluded that the lack of results in the investigations has made it impossible, in the particular circumstances of this case, for the petitioners to bring actions for just compensation for the injuries and distress they have suffered. In that regard, the Commission considers that the admissibility of the instant petition cannot be made subject to the exhaustion of remedies that lacked effectiveness because the petitioners were unable, for procedural reasons, to move them forward. As the State rightly points out in its reply, given that it has not been possible to determine the criminal responsibility of the police officers or of any other persons, assessment of compensation was not in order.

58. In light of the foregoing, the Commission concludes that the exceptions provided by Articles 46(2)(b) and (c) of the American Convention are applicable in the instant case. As it has on previous occasions, the Commission would like to point out that the application of the exceptions allowed under Article 46 of the Convention to determine the admissibility of a petition does not imply any prejudgment of the merits of the petition. The criterion used by the Commission to analyze the petition during the admissibility phase is preliminary in nature. Consequently, while the Commission concludes that the record of the case supports its admissibility, the causes and effects that prevented exhaustion of local remedies will be examined, as appropriate, when dealing with the merits of the dispute, in order to determine whether they constitute violations of the American Convention.

b. Deadline for lodging the petition

59. Article 46(1)(b) of the Convention states that for a petition to be admissible, it must be lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment. However, Article 46(2) of the Convention and Article 32(2) of the Commission's Rules of Procedure provide that this "rule does not apply when it has been impossible to exhaust internal remedies due to a lack of due process, denial of access to remedies, or unwarranted delay in issuing a final decision (...) Nor does this rule apply where the allegations concern a continuing situation--where the rights of the victim are allegedly affected on an ongoing basis."[FN13]

[FN13] See IACHR, Report N° 72/01, Op. Cit., paragraph 54; Report N° 5/02, Op. Cit., paragraph 55; Report N° 31/99 (Admissibility), Case 11.763, Plan de Sánchez Massacre, Guatemala, April 16, 1999, paragraphs 29 and 30.

60. In the instant case, the Commission is of the opinion that, in application of Articles 46(2) of the Convention and 32(2) of its Rules of Procedure, the requirement stipulated in Article 46(1)(b) of the American Convention does not apply, for the following reasons: 1) the petitioners cannot be required to exhaust the remedies under domestic law because of the lack of conclusive or effective results in the investigation carried out in the domestic jurisdiction; 2) the relatives of the young Santillan have continued their efforts to obtain full clarification of the facts, and have requested the reopening of the investigation; 3) they allege a continuing denial of justice. The Commission therefore finds that the petition was filed within a reasonable time from the date on which the alleged human rights violations occurred.

c. Duplication of proceedings and res judicata

61. There is nothing in the record to suggest that the petition is pending in another international proceeding for settlement or that it is substantially the same as one previously studied by the Commission or by another international organization. Therefore, the requirements established in Articles 46(1)(c) and 47(d) of the Convention have been met.

d. Nature of the alleged violations

62. The Commission considers that the petitioners' allegations regarding the alleged violations of the rights of Gabriel Egisto Santillán Reigas could, if proven, constitute violations of the right to life, the right to humane treatment, the right to a fair trial and the right to judicial protection, guaranteed by Articles 4, 5, 8 and 25 of the Convention in conjunction with Article 1(1). Furthermore, there is nothing to indicate that the petition is manifestly groundless or out of order. The Commission, therefore, considers that the requirements established in Article 47(b) and (c) of the American Convention have been met.

63. Furthermore, while the petitioners have not expressly made any claims to this effect, the Commission, by virtue of the principle of *iura novit curia*, which requires international organs to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them,[FN14] will examine, as appropriate, the allegations in the light of Article 19 of the American Convention, which establishes the special protection that the State is required to provide to children.

[FN14] PCIJ, Lotus Case, Judgment of September 7, 1927, Series A N° 10, p.31.

V. CONCLUSION

64. The Commission concludes that it is competent to hear this case and that the petition is admissible under the provisions of Articles 46 and 47 of the American Convention.

65. Based on the foregoing arguments of fact and of law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the instant case admissible with respect to the alleged violations of Articles 4, 5, 8 and 25, in conjunction with Article 1(1) of the American Convention on Human Rights, as well as Article 19 to the extent pertinent.
2. To notify the State and the petitioners of this decision.
3. To request from the State a complete copy of judicial proceeding N° 23.148/91, related to the death of Gabriel Egisto Santillán, and, at the same time, request the suspension of the order of destruction of the record until the organs of the system have issued a decision on the merits of the instant petition.
4. To proceed with its analysis of the merits of the case.
5. To publish this decision and include it in the Annual Report of the IACHR to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 22nd day of the month of October, 2003. (Signed): José

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Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Robert K. Goldman and Julio Prado Vallejo, Commissioners.