Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 117/06; Petition 1070-04
Session:	Hundred Twenty-Sixth Regular Session (16 – 27 October 2006)
Title/Style of Cause:	Milagros Forneron and Leonardo Anibal Javier Forneron v. Argentina
Doc. Type:	Decision
Decided by:	President: Evelio Fernandez Arevalos; First Vice-President: Paulo Sergio Pinheiro; Second Vice-President: Florentin Melendez; Commissioners: Freddy Gutierrez, Paolo G. Carozza. Commission Member Victor E. Abramovich, who is Argentinean, did not participate in the deliberations or decision of the present case, in accordance with the provisions of Article 17.2.a of the Rules of Procedure of the Commission.
Dated:	26 October 2006
Citation:	Forneron v. Argentina, Petition 1070-04, Inter-Am. C.H.R., Report No. 117/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2006)
Represented by:	APPLICANTS: Margarita Rosa Nicoliche, Susana Ana Maria Terenzi and Alberto Pedronccini
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I. SUMMARY

1. This report concerns the admissibility of Petition No. 1070-04 which was opened by the Inter-American Commission on Human Rights (hereinafter "Inter-American Commission", "Commission" or "IACHR") following receipt of a petition on October 14, 2004, lodged by Leonardo Aníbal Javier Fornerón and Margarita Rosa Nicoliche, legal representative of CESPPEDH (Centro de Estudios Sociales y Políticos para el Desarrollo Humano), juridically represented by Susana Ana María Terenzi and Alberto Pedronccini, president of APDH, the Permanent Assembly for Human Rights, (hereinafter "the petitioners"), against the Republic of Argentina (hereinafter "Argentina", or "the State"). The petitioners allege that the State is responsible under the terms of the American Convention on Human Rights (hereinafter "American Convention" or "the Convention") because Leonardo Aníbal Javier Fornerón was prevented from caring for and bringing up his daughter, Milagros Fornerón, thus prejudicing his rights as a father and the best interests of the child.

2. The petitioners claim that on June 16, 2000, the child Milagros, daughter of Diana Elizabeth Enríquez, was born in the city of Victoria in the province of Entre Ríos and that the following day in the presence of the Ombudsman for Children and the Poor, [Defensor de Pobres y Menores] she was delivered into the provisional guardianship of a couple with a view to adoption.

3. It is claimed in the petition that Mr. Leonardo Aníbal Javier Fornerón learned that Milagros was his daughter on July 4, 2000, and formally recognized her on July 18, 2000 at the Registry for Marital Status and Personal Legal Capacity in the city of Victoria. It is stated that on October 18, 2000, Mr. Fornerón applied to the civil and commercial judge of first instance in the city of Victoria for the suspension of the provisional guardianship order and for the return of his daughter. However, on May 17, 2001, the judge decided to award guardianship of Milagros to the couple to whom she had been delivered by her biological mother. It is also alleged that on November 15, 2001, Mr. Fornerón brought proceedings for visiting rights in which no resolution had yet been reached by the time the petition was lodged, which the petitioners allege has prevented him from getting to know his daughter. The petition alleges that the proceedings for both legal guardianship and visiting rights were marked by unwarranted delays on the part of the jurisdictional authorities and that this has led to Mr. Fornerón being excluded from Milagros' life.

4. The State, for its part, claims that Leonardo Aníbal Javier Fornerón had full access to all effective legal remedies, in the civil as well as in the criminal courts and although he has never relinquished his claims before the relevant judicial authorities for the return of his daughter Milagros, there have been inactive periods in the management of his case where the delays have not been attributable to the local legal authorities. The State maintains that Leonardo Aníbal Javier Fornerón failed to exhaust the additional mechanism of an extraordinary appeal at federal level, in the criminal process, and also a direct appeal to the Supreme Court of Justice, as part of the case concerning legal guardianship. The State therefore believes the case should be declared inadmissible.

5. As stipulated in Articles 46 and 47 of the American Convention, as well as in Articles 30 and 37 of its Rules of Procedure, and having examined the positions of the parties, the Commission decided to declare the petition admissible. Therefore, the IACHR decides to notify its decision to the parties and to continue its examination of the merits of the case in relation to the alleged violations of Articles 17 (the Rights of the Family), 19 (the Rights of the Child), and 24 (the Right to Equal Protection), as well as 8 (the Right to a Fair Trial), and 25 (the Right to Judicial Protection), in relation to Article 1.1 (Obligation of the State to Respect Rights) of the American Convention. The Commission also decided to notify the parties of this decision, to publish it, and to include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BY THE COMMISSION

6. The petition was lodged by the petitioners with the Executive Secretariat of the Commission on October 14, 2004. The Commission began to process the petition on January 21, 2005, when it transmitted to the State the relevant parts of the petition and requested it to respond within a period of two months.

7. On February 28, 2005, additional information was received from the petitioners and on March 22, 2005, they lodged a request for precautionary measures in favor of Milagros Fornerón alleging that the couple who had guardianship of Milagros had begun proceedings for full

adoption that could bring about a definitive change in the legal status of the minor because if the adoption was granted all links with her biological family would be broken. In accordance with the decision by the Commission, on March 31, 2005, information was requested from the State in order to evaluate the situation. The State responded in due course by means of a communication received on April 11, 2005.

8. On May 31, 2005, additional information was received from the petitioners, which was transmitted to the State on June 13, 2005, and the State was asked to present its observations within one month. The State responded by means of a communication received on July 27, 2005 and this was transmitted to the petitioners on November 21, 2005.

9. The petitioners filed additional communications on December 28, 2005 and April 12, 2006, which were both transmitted to the State on August 21, 2006.

III. POSITIONS OF THE PARTIES

A. Petitioners

10. The petitioners state that on July 3, 2000, Leonardo Aníbal Javier Fornerón learned that Diana Elizabeth Enríquez, with whom he had had a personal relationship lasting approximately 12 months, had on June 16, 2000, given birth to a girl, Milagros who would also be his daughter; and for this reason on July 4, 2000, he appeared before the Victoria Ombudsman for Children and the Poor where he registered his intention to recognize the child. The petitioners explain that Mr. Fornerón lives in the city of Rosario de Tala which is approximately 100 kilometers from the city of Victoria. On July 18, 2000, Leonardo Aníbal Javier Fornerón formally recognized Milagros before the Registrar for Marital Status and Personal Legal Capacity in the city of Victoria, province of Entre Ríos.

11. The petitioners state that on June 17, 2000, one day after she was born, Milagros was placed by her mother with a couple, with a view to her adoption. They state that when he heard this, Leonardo Aníbal Javier Fornerón denounced the possible committing of the crime of suppression of civil status, and on July 11, 2000 brought the case called “Investigating Officer requests prior measures. Possible crime of suppression of legal status.” The petitioners state that certain pieces of evidence suggested to the investigating officer that “it was possible to allege that a baby buying or selling scenario existed on the basis of the following details: a single girl, pregnant, had received a financial offer to hand over her daughter at birth; a couple was found who were on the register of those wishing to adopt and who were willing to pay to have a child; the young girl was taken to another city (Victoria) where she met the couple; she entered a private clinic, at no cost to herself, in which the couple also stayed; when the child was born the situation was whitewashed by placing her into foster care in the presence of an officer from the office of the Ombudsman for Children and the Poor.

12. The petitioners state that on August 4, 2000, the judged decided to close the file relating to the legal proceedings because he was of the opinion that “leaving aside any legal and ethical assessment of the behavior of Diana Elizabeth Enríquez and of those who helped her and/or

incited her to act in such a way, she is not punishable under the terms of Article 138 of the Penal Code.[FN2]"

[FN2] Art. 138. - A prison sentence of between one and four years is applicable for any act whatsoever that throws doubt on, alters, or suppresses the legal status of another person.

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13. They state that the prosecutor appealed against this decision on August 10, 2000 and on September 12, 2000, the Criminal Court of Gualaguey, in the province of Entre Ríos, resolved to revoke the contested court decision and instructed the acting judge to continue investigating the case. However, they allege that although the investigating officer presented sufficient evidence to substantiate a possible claim of child trafficking, the case judge on January 31, 2001 shelved the proceedings because the act is not subject to criminal proceedings based on the argument that trafficking babies is not defined in the criminal code and can only be sanctioned when it involves an attack on a person's identity or marital status, and provided that a parent/child filiation is altered.

14. Furthermore, the petitioners allege that based on his desire and need to both know and bring up his daughter, in the proceedings entitled "Enríquez Milagros s/ Legal Guardianship," Mr. Fornerón, on October 18, 2000, asked for the provisional guardianship to be halted and to have his daughter returned to him. As part of these proceedings, given that the biological mother denied that Leonardo Aníbal Javier Fornerón was the father of Milagros, on November 14, 2000 Mr. Fornerón underwent a DNA test, the result of which was received on December 11, 2000 and indicated a 99.9992% probability that he was the father of Milagros. The petitioners allege that notwithstanding this, and disregarding the fact that the child should be with her biological family, who claimed her, on May 17, 2001, the judge of first instance in the Civil and Commercial Court of Victoria, resolved to grant guardianship to the couple in whose care she already was.

15. The petitioners stress that the finding of the court of first instance on May 17, 2001, denies the rights of Leonardo Aníbal Javier Fornerón as biological father, because it concludes that no formal partnership had existed between him and Diana Elizabeth Enríquez and that the fruit of that relationship, Milagros, was not the result of love or of a desire to set up a family, and that as Mr. Fornerón did not know the child and was not married, Milagros would lack the presence in her life of a mother. The petitioners are of the opinion that this argument is discriminatory and does not respect the greater interest of the child, which would be to know and grow up in the bosom of her biological family.

16. The petitioners state that on May 18, 2001, Mr. Fornerón appealed the finding of the court of first instance, which was revoked on June 10, 2003 by the First Court of the Second Chamber of Appeals of Paraná, capital of the province of Entre Ríos, because it was of the opinion that it was necessary to essentially respect the dignity of the person of Milagros, her freedom to be with her family of birth and her biological identity, and resolved therefore to annul the guardianship decided by the judge of first instance in the Civil and Commercial Court of Victoria. However, both the guardians and the Ombudsman for the Rights of Children and the

Poor, on June 27 and 30, 2003 respectively, lodged appeals against the findings which were both accepted, and the resolution of first instance was reinstated. On April 2, 2004, the Civil Court of the High Court of Justice of the Province of Entre Ríos decided to turn down the extraordinary federal appeal lodged by Mr. Fornerón.

17. The petitioners allege that the delay that existed in the proceedings for legal guardianship was a determining factor to the detriment of Leonardo Aníbal Javier Fornerón, and his paternal rights, because he lost the first years of Milagros' life and this led to her building up emotional ties with the guardians instead of building them up with her biological family.

18. The petitioners state that although the finding of the court of first instance allowed for the possibility of visiting rights for Leonardo Aníbal Javier Fornerón, he brought proceedings to establish visiting rights on November 15, 2001, under which it took until February 14, 2003, for a hearing to take place between the parties, Mr. Fornerón and the guardians, supposedly to enable him and Milagros to begin a process of getting to know each other, but only one meeting took place without the child being present, and the second was cancelled by telephone. Because of that, on November 25, 2003, Mr. Fornerón made a further request for the visiting rights to be implemented. They allege that from the beginning, proceedings were delayed, for reasons not attributable to Leonardo Aníbal Javier Fornerón, due to jurisdictional competence issues. They state that finally, on April 8, 2005, a new meeting was arranged for April 29, 2005, when the guardians were to appear with Milagros. Once again, the couple omitted to bring the child. The petitioners allege that the refusal by the judge to issue a resolution concerning visiting rights unjustifiably prevented Mr. Fornerón from getting to know his daughter Milagros and so infringed his right to a family. The petitioners consider that an unjustifiable delay occurred in the proceedings and that the judge bore a responsibility for not sanctioning the guardians in any way when they ceased to attend the meetings that were indicated in order to allow Leonardo Aníbal Javier Fornerón and his daughter to get to know each other.

19. In a communication received on December 28, 2005, the petitioners stated that on October 21, 2005 the first meeting took place between Leonardo Aníbal Javier Fornerón and his daughter Milagros, in the presence of a psychologist appointed by the judge. The meeting lasted 45 minutes. They add that on November 18, 2005, Mr. Fornerón applied once more to the court to request a decision on visiting rights. They state that the judge had recently instructed that the guardians be informed of the request, all of which they considered caused further delays in implementing the resolution and hindered the periodic meetings between Milagros and her biological father. They allege that the delays experienced in the proceedings dealing with visiting rights have infringed Leonardo Aníbal Javier Fornerón's paternal rights and Milagros' rights as a daughter, because they have been deprived of the right of living together, and the child is now six years old.

20. Furthermore, the petitioners claim that Leonardo Aníbal Javier Fornerón learned on March 10, 2005, of the existence of the proceedings for full adoption brought by the guardians of Milagros when he was served with a summons to appear before the case judge on April 9, 2005. They state that Mr. Fornerón appeared and stated his opposition to the granting of the adoption. By a communication received on April 12, 2006, the petitioners reported that a judgment had been handed down in those proceedings in February 2006 by which simple adoption of Milagros

was awarded to the custodian couple, and her surname was ordered to be changed to that of the guardians.

B. State

21. In its communications, the State explains that there are four legal files relating to the situation of the minor Milagros.

22. Regarding the case entitled "Investigating Officer requests prior measures. Possible crime of suppression of legal status", the State claims that on January 31, 2001, the instructing judge was of the opinion that there had been nothing criminal in the behavior of Diana Elizabeth Enríquez in that she had traveled to the city of Victoria, registered at a private health establishment, given birth, and registered the child as her own, delivered her into the pre-adoptive foster care of a married couple and stated her intentions before a legal officer. The State adds that the instructing judge also disregarded the claim that either Leonardo Aníbal Javier Fornerón or the child Milagros had been the victims of any criminal act.

23. The State alleges however that even though on February 5, 2001, the investigating officer presented an appeal and the criminal court of the city of Gualeguay resolved to reject it, there is no evidence of proceedings or attempts to dispute the judicial decision by filing an extraordinary federal appeal, nor that Leonardo Aníbal Javier Fornerón took the proceedings of the case any further than the mere accusation.

24. With reference to the case entitled "Enríquez Milagros s/ Legal Guardianship", the State claims that on August 1, 2000, the married couple who had been awarded provisional guardianship of Milgros appeared before the judge of first instance in the civil and commercial court of the city of Victoria to request the legal guardianship of Milagros. On October 18, 2000, Leonardo Aníbal Javier Fornerón appealed to the same court to prevent the granting of custody and request the return of the child to him, which he repeated on February 14, 2001, having obtained the results of the DNA test, and again on May 7, 2001. The State claims that on May 9, 2001, the expert psychologist presented her report and was of the opinion that it would be psychologically damaging for the child to be moved from the couple whom she recognizes and with whom she has built up emotional ties, to another family that she does not know. The State claims that both the Ombudsman for Children and the Poor and the jurisdictional legal officer agreed with the opinion of the expert psychologist that Milagros should remain in the guardianship of the couple.

25. On May 17, 2001, the judge resolved to grant guardianship to the said couple. Since Mr. Fornerón appealed against this, the second chamber of Paraná on April 23, 2002, ordered that a socio-environmental study be carried out on Leonardo Aníbal Javier Fornerón, requested any background information that might be held by the Office of the Ombudsman (Defensoría Oficial), and asked for interviews to be held with the parents and guardians of the child by a technical psychiatric and psychological team, and by members of the court, all of which, the State alleges, was carried out.

26. The State says that in the interview carried out with the guardians of Milagros, the professionals in charge had noted that "both are professionals, of a good social and economic standing, with a sound family situation that would favor healthy emotional ties and a good emotional environment which would obviously contribute positively to the child's development." The team also observed that if it was decided that Milagros should be handed to her biological father "this could cause emotional instability in the child, upset her character, and cause intellectual impairment, in addition to the anguish caused by separating the child from those she has come to identify as parents." In addition, the biological father is unmarried and this would mean the child would lose a mother.

27. The State states that although on June 10, 2003, the First Court of the Second Chamber in Paraná resolved to revoke the judgment of the court of first instance, the guardians and the Ombudsman for Children and the Poor both lodged appeals which were accepted on November 20, 2003, and the judgment of the court of first instance was upheld. On April 2, 2004 the civil court of the High Court of Justice for the Province of Entre Ríos resolved to reject the extraordinary federal appeal lodged by Mr. Fornerón. The State emphasizes that the measure used by the petitioner was rejected by the High Court on the grounds that it did not comply with the common, correct, and formal requirements necessary within the framework of the remedy described in Article 14 of Law 48; specifically, that the petition was not self sufficient and did not effectively introduce the federal question in time or form. Furthermore, the State indicates that independently of this, the jurisdictional authority resolved that the remedy would not be lawful because the decision that was being questioned lacked institutional importance and does not lead to an unreasonable or disproportionate solution. The State also points out that it is not stated in the proceedings that Mr. Fornerón ever tried to appeal against the High Court judgment by applying directly to the country's Supreme Court of Justice.

28. With regard to the case entitled "Fornerón Leonardo Aníbal Javier. Visiting Rights," the State claims that Mr. Fornerón lodged a petition with the Civil and Labor court of Rosario de Tala on November 15, 2001, setting in motion a case for visiting rights, and for reasons of competence this was referred to the Civil and Commercial Court of Victoria on April 19, 2002. By November 25, 2003, Mr. Fornerón had requested a date for a hearing and on April 7, 2004, the Victoria judge declared the court competent. One year later, on April 8, 2005, Leonardo Aníbal Javier Fornerón requested a hearing in order to establish a regime for visiting, which was held on April 29, 2005, at which it was agreed that an expert psychologist should interview the child in order to prepare her for a meeting with her biological father. On June 14, 2005, the judge agreed to bear in mind the proposal from Leonardo Aníbal Javier Fornerón with regard to a possible calendar of visits, and ordered it to be transmitted to the guardians in order for them to comment thereon.

29. With regard to the case entitled "Fornerón Milagros s/Full Adoption," the state points out that on June 6, 2004, the guardians brought proceedings applying for full adoption and the judge therefore, having called for the relevant documents from the Ombudsman for Children and the Poor and from the investigating officer, decided to summon the parents of Milagros to a hearing. On October 28, 2004, Diana Elizabeth Enríquez appeared, and indicated her agreement to the full adoption of her daughter Milagros, and on March 18, 2005, Mr. Fornerón indicated his opposition to the adoption. On April 27, 2005, the Ombudsman for Children and the Poor

recommended that the court should opt for simple adoption of the minor by the guardian couple; and on June 2, 2005, the investigating officer was of the opinion that the aforementioned couple possessed suitable moral and material conditions for a viable adoption and therefore recommended that the child be given to them in simple adoption.

30. The State claims that an examination of the judicial acts carried out in the domestic arena shows how the situation described by the petitioners has been reviewed by all the different agencies concerned, in the civil as well as in the criminal jurisdictions. Although it is true that Leonardo Aníbal Javier Fornerón has never stopped petitioning the legal authorities for the restitution of his daughter Milagros, the State maintains that there have been periods of inactivity in his legal proceedings which cannot be attributed to the local jurisdiction. Consequently, the State considers that Leonardo Aníbal Javier Fornerón had full access to all the remedies in the domestic jurisdiction and failed to exhaust them to the extent defined in Article 46 of the American Convention.

IV. ANALYSIS

A. Competence of the Commission ratione personae, ratione materiae, ratione temporis and ratione loci

31. The petitioners are empowered to lodge a petition with the Commission by Article 44 of the American Convention. The petition names as alleged victims certain individuals whose rights under the American Convention the State has agreed to respect and protect. The Commission notes that Argentina has been a State party to the Convention since September 5, 1984, when it deposited its instrument of ratification. Therefore, the Commission has competence ratione personae to examine the petition.

32. The Commission has competence ratione loci to examine the petition because the petition alleges violations of rights protected under the American Convention which took place within the territory of a State party to the Convention. The IACHR has competence ratione temporis because the obligation to respect and protect the rights enshrined in the American Convention was already in force for the State at the date on which the violations of rights alleged in the petition took place. Finally, the Commission has competence ratione materiae because the petition alleges violations of human rights enshrined in the American Convention.

B. Other requirements for admissibility

1. Exhaustion of remedies under domestic law

33. Article 46.1.a of the American Convention states that for a petition lodged before the Commission to be admissible according to Article 44 of the Convention, it is necessary that all remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to ensure that the State in question has the possibility to resolve disputes within its own legal jurisdiction.

34. The requirement of prior exhaustion is applicable when domestic legislation does in fact provide remedies that are adequate and effective to remedy the alleged violation. In this sense, Article 46.2 specifies that the requirement is not applicable when domestic law does not afford due process of law for the protection of the right in question; or if the alleged victim has been denied access to the remedies under domestic law; or if there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. As stated in Article 31 of the Rules of Procedure of the Commission, when a petitioner alleges one of these exceptions it shall be up to the State concerned to demonstrate that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.

35. In the instant case, with regard to the proceedings entitled "Fornerón Milagros s/Full Adoption," the Commission observes that Leonardo Javier Aníbal Fornerón was not a party to the above proceedings but was merely called to appear, and did appear, in order to oppose the adoption of Milagros requested by the guardian couple. Therefore the Commission observes that there was no obligation on Mr. Fornerón to exhaust any remedies in relation to the above-mentioned proceedings.

36. Regarding the argument made by the State to the effect that in the proceedings entitled "Investigating Officer requests prior measures. Possible crime of suppression of legal status" an extraordinary federal appeal was neither brought nor exhausted, the petitioners point out that Leonardo Aníbal Javier Fornerón, by appealing, exhausted all the ordinary remedies available under domestic law that could have been effective. The Commission observes, in this respect, that the crime alleged was liable to prosecution by the State. It was incumbent upon the State to carry out the proper investigation, an obligation that was not Mr. Fornerón's responsibility. Furthermore, the Commission observes that even if an extraordinary federal remedy had been exhausted, the results would not have been able to remedy the situation denounced in the present petition.

37. In order to determine the degree of compliance of this requirement for admissibility, the remedies concerning legal guardianship and visiting rights are of paramount importance. The State claims that in the proceedings entitled "Enríquez Milagros s/Legal Guardianship," there is no evidence that Leonardo Aníbal Javier Fornerón attempted to appeal against the finding of the Civil Court of the High Court of Justice in the Province of Entre Ríos, by appealing directly to the Argentinean Supreme Court of Justice. In this regard, the petitioners state that because proceedings in the ordinary remedies took almost four years, for a matter where time is of the essence, Mr. Fornerón feared that there would be an even greater delay if he appealed to the Supreme Court, in addition to which it would not help to remedy the delay that had already taken place.

38. Regarding the proceedings entitled "Fornerón Leonardo Aníbal Javier. Visiting Rights," the State claims that Leonardo Aníbal Javier Fornerón did not repeatedly request the meetings that should have taken place. The petitioners, for their part, claim that delays in the proceedings caused by questions of jurisdictional competence, prevented any familiarity developing between Mr. Fornerón and his daughter Milagros.

39. Regarding these two remedies concerning legal guardianship and visiting rights, the Commission observes that the first lasted from October 2000 until April 2004, and the second was opened in November 2001, and according to the records has not yet been resolved in law. With regard to the proceedings to do with legal guardianship, it is evident that two years passed between the decision of first instance and the reversal of second instance. Although the State has shown that Mr. Fornerón had opportune access to the remedies available under domestic law, it has offered no information to either explain or justify the duration of these two proceedings.

40. The IACHR observes that approximately two years and a half elapsed between the date on which Mr. Fornerón brought his request for visiting rights on November 15, 2001, and April 7, 2004, the date on which the Victoria judge declared himself competent, a delay that cannot in any way be attributed to Mr. Fornerón. Moreover, the IACHR notes that the State alleges merely that Mr. Fornerón did not repeatedly request the familiarization meetings with Milagros; however, it fails to allege that any other remedy should have been exhausted in order to resolve the issue. In accordance with the burden of proof applicable in the case, any State that alleges the non-exhaustion of remedies available under domestic law must indicate the remedies that were available to be exhausted and must provide proof of their effectiveness.[FN3] In the present case, the State did not satisfy the burden of proof incumbent on it.

[FN3] See IACHR, Report Nº 32/05, petition 642/03, Admissibility, Luis Rolando Cuscul Pivaral and other persons affected by HIV/AIDS, Guatemala, March 7, 2005, paras. 33-35; I/A Court H.R., The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Exceptions, supra note 3, para. 53; I/A Court H.R., Durand and Ugarte Case. Preliminary Exceptions. Judgment of May 28, 1999, Series C No. 50, para. 33; and I/A Court H.R., Cantoral Benavides Case. Preliminary Exceptions. Judgment of September 3, 1998. Series C No. 40. para. 31.

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41. To assess any delay in resolving remedies available under domestic law, the purpose of the legal action must also be taken into account. In this regard, the Commission must take into account that the actions undertaken by Leonardo Aníbal Javier Fornerón were intended to enable him to establish and maintain an emotional and caring relationship with his daughter Milagros. The Commission must also take into account that the petitioners consider that the length of time taken by the proceedings had a particularly deleterious effect on the rights of Leonardo Aníbal Javier Fornerón and of his daughter Milagros because as time passed, the child built up stronger ties with her guardians and this factor was then used to maintain the adoption and to reject the claims of the biological father. The Commission therefore notes that the judicial proceedings concerning guardianship and custody of a boy or girl should be handled with dispatch because of the importance of the interests involved.[FN4]

[FN4] See, in general, the European Court of Human Rights, Johansen vs. Norway, August 7, 1996, 1196-III, No. 13, para. 88.

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42. In the light of the foregoing analysis, the Commission concludes that Leonardo Aníbal Javier Fornerón invoked the ordinary remedies provided by the legal system of the State and therefore that the State was fully aware of the claims that gave rise to the legal petition. Taking into account the length of the ordinary remedies and allowing for the fact that the remedy invoked as necessary by the State is subject to discretionality as to how it is exercised and how long it lasts, it would not be reasonable to demand that the petitioner exhausts that extraordinary remedy as a condition of admissibility. As stated by the Inter-American Court, "the rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective…"[FN5]

[FN5] I/A Court H.R., Velásquez Rodríguez Case. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 93. I/A Court H.R., Godínez Cruz Case. Preliminary Exceptions. Judgment of June 26, 1987. Series C, No. 3, para. 93. As indicated by the Commission, those remedies whose processing is subject to undue delays cease to be effective. See, for example, IACHR, Report No. 27/00, Admissibility, Case 11.697, Ramón Mauricio García-Prieto Giralt, El Salvador, March 9, 1999, para. 47.

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43. Therefore, without prejudice to anything that may be disposed regarding the merits of the case in the future by the Commission, the Commission concludes that there was an unwarranted delay in the proceedings of the remedies concerning legal guardianship and visiting rights and this excuses the petitioner from the obligation to invoke additional exceptional remedies. It should be noted that although the application of this exception is closely linked with issues relating to appropriate access to protection measures and judicial guarantees, the former is decided in line with the admissibility criteria of the system which differ from those that are applicable during the merits stage. The causes that prevented the opportune exhaustion of remedies available under domestic law, as well as any possible consequences, will be examined in the extent in which they are relevant when the Commission examines the merits of the case.

2. Deadline for presentation of petitions

44. In accordance with Article 46.1 of the Convention, for a petition to be admissible it must be lodged before the stipulated deadline, that is, within six months from the date on which the party alleging violation of his rights was notified of the final judgment. The six months rule ensures legal certainty and stability once a judgment has been reached.

45. Article 32 of the Rules of Procedure of the Commission defines the principle described above and indicates that the rule is not applicable "in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable." This Article states that in these cases, the petition shall be presented "within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case."

46. In the present case, we should not forget that Leonardo Aníbal Javier Fornerón lodged his petition on October 14, 2004 having been notified on April 14, 2004 of the judgment which

rejected the extraordinary federal appeal, in the case entitled "Enríquez Milagros s/Judicial guardianship." It should also be taken into account that at the time the petition was lodged, judgment was still pending in the proceedings regarding visiting rights brought on November 15, 2001. The Commission has concluded that due to the prolonged duration of the ordinary proceedings it is appropriate to exempt this petition from the requirement of prior exhaustion of additional extraordinary remedies. Therefore, the Commission considers that the petition was lodged within a reasonable period and that the requirements of Article 46.1.b have been observed.

3. Duplication of procedures and res judicata

47. Article 46.1.c states that the admission of a petition shall be subject to the requirement that the subject "is not pending in another international proceeding for settlement" and Article 47.d of the Convention establishes that the Commission shall consider inadmissible any petition "that is substantially the same as one previously studied by the Commission or by another international organization." In this case, the parties have not alleged any of the circumstances that would give rise to inadmissibility, and nor do they occur in the proceedings.

4. Description of the alleged facts

48. Article 47.b of the American Convention considers inadmissible any petition that does not state facts that tend to establish a violation of the rights guaranteed by the Convention.

49. It is evident that the State questions the admissibility of this petition only on the grounds of the non-exhaustion of remedies available under domestic law, an issue that was examined by the Commission in the relevant section. The State did not present any specific allegations concerning Article 47.b of the American Convention.

50. In the present case, it is not for the Commission at this stage of the proceedings to decide whether or not the alleged violations of the American Convention actually took place. The IACHR has carried out a prima facie evaluation and decided that the petition describes complaints that, were they to be proved, could be described as possible violations of the rights protected by the Convention. In this regard, the Commission is competent to examine the situation that is the subject of this complaint in the light of Article 17 of the American Convention concerning the obligations of the State to protect the rights of the family. Furthermore, Milagros Fornerón was entitled to special measures of protection of minors. In this regard, the Commission will examine the facts alleged in relation to the duties of States to prevent and protect in accordance with Article 19 of the Convention.[FN6]

[FN6] See, inter alia, The European Court of Human Rights, Keegan vs. Ireland, May 26, 1994, paragraph 50, regarding the scope of this protection with regard to the relationship between parents and children.

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51. On the basis of the information and arguments lodged concerning the excessive time that elapsed during the proceedings for judicial guardianship and visiting rights, the Commission observes that were these to be proved, they could be described as violations of Article 25 of the Convention concerning the right to prompt recourse to judicial protection as well as of the judicial guarantees described in Article 8 of the American Convention, because Leonardo Aníbal Javier Fornerón had the right to be heard in order to determine his rights within a reasonable period.

52. Furthermore, in its examination of the merits, the Commission will decide whether the findings of the proceedings for guardianship and adoption were in any way discriminatory, under the terms of Article 24 of the Convention, to the detriment of Mr. Fornerón.

53. Consequently, the Commission concludes in this case that the petitioners have lodged complaints that if compatible with other requirements and if proved correct, could suggest grounds for proving the violation of rights protected by the American Convention; specifically those rights enshrined in Articles 8 (Right to a Fair Trial), 17 (Rights of the Family), 19 (Rights of the Child), 24 (Right to Equal Protection), 25 (Right to Judicial Protection), and 1.1 (Obligation of the State to Respect Rights).

V. CONCLUSIONS

54. The Commission concludes that it has competence to examine the case and that the petition is admissible in accordance with Articles 46 and 47 of the American Convention.

55. Based on the foregoing considerations of fact and law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this case admissible in relation to alleged violations of the rights protected in Articles 1.1, 4, 8, and 25 of the American Convention.
2. To give notice of this decision to the parties.
3. To continue the analysis of the merits of the case.
4. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 26th day of the month of October, 2006. (Signed): Evelio Fernández Arévalos, President; Paulo Sérgio Pinheiro, First Vice-President; Florentín Meléndez, Second Vice-President; Freddy Gutiérrez and Paolo G. Carozza, Commissioners.