

**REPORT No. 147/11**  
PETITIONS 4418-02 JOSÉ ANTONIO GÓMEZ TELLO AND IVÁN VÍCTOR ENRÍQUEZ FEIJÓO,  
980-03 SUSSY IVETTE AND WENDY ESTAHEL ENCALADA CHERREZ  
ADMISSIBILITY  
ECUADOR  
November 1<sup>st</sup>, 2011

**I. SUMMARY**

1. This report refers to two petitions presented on behalf of the boys José Antonio Gómez Tello (14) and Iván Víctor Enríquez Feijóo (12) (P-4418-02)<sup>1</sup> and the girls Sussy Ivette (16) and Wendy Estahel Encalada Cherrez (14) (P-980-03)<sup>2</sup> (hereinafter also "the alleged victims"), which allege violation by the Republic of Ecuador (hereinafter also "Ecuador" or "the State") for not having taken measures to enforce the constitutional protection rulings (*amparo*) issued by the Constitutional Court and published on January 14, 2002 and on November 30, 2001, an omission which is said to have affected the human rights of the alleged victims, including their right to education.

2. In Petition 4418-02 it is alleged that the State is responsible for the violation of the right to humane treatment, the rights of the child, the right to equal protection, and the right to judicial protection provided for under Articles 2, 5, 19, 24 and 25 of the American Convention (hereinafter "the Convention" or "the American Convention"), in conjunction with the obligation to respect rights, in accordance with its Article 1(1). The petitioners consider the requirement of exhaustion of domestic remedies to have been satisfied. For its part, the State replies that the claims are inadmissible given the failure to submit the petition within the stipulated time frame, domestic remedies were not exhausted, and the alleged violations were not characterized.

3. In Petition 980-03 it is alleged that the State is responsible for the violation of the rights to the protection of honor and dignity, the rights of the child, nondiscrimination, and judicial protection provided for under Articles 11, 19, 24, and 25 of the American Convention, in conjunction with the obligation to respect rights, in accordance with its Article 1.1. The State replies that the claims are inadmissible due to the failure to exhaust domestic remedies, to characterize the violations - given the existence of an out-of-court settlement signed by the petitioner-, and because the IACHR does not function as a court of appeals.

4. Because of the identity of the facts of the petitions, the Commission decided to analyze their admissibility together. After examining the positions of the parties in light of admissibility requirements stipulated in Articles 46 and 47 of the Convention, the Commission concludes that it is competent to hear the claim, and that it is admissible for the alleged violation of Articles 5,<sup>3</sup> 19, and 25, in conjunction with Article 1(1) of the American Convention and of Article 13 of the Protocol of San Salvador. Finally, it decides to declare inadmissible the petition with regards to Articles 11 and 24 of the American Convention and to join the claims to case 12.698 (Adriana Victoria Plaza Orbe and Daniel Ernesto Plaza Orbe). Therefore, it orders that the parties be notified of the report, that the report be published, and that it be included in its Annual Report to the General Assembly of the OAS.

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<sup>1</sup> On 31 October 2002, Pedro Pablo Gómez Valdivieso and Iván Víctor Enríquez Contreras filed a petition on behalf of José Antonio Gómez Tello and Iván Víctor Enriquez Feijóo, aged 14 and 12 years, respectively, on the date the original petition received on 31 October 2002 was submitted.

<sup>2</sup> On 19 November 2003, Ernesto Salvador Encalada Sotomayor filed a petition on behalf of Sussy Ivette and Wendy Estahel Encalada Cherrez, aged 16 and 14 years, respectively, at the time the alleged facts occurred.

<sup>3</sup> With regard to petition 980-03, by application of the principle of *iura novit curia*.

## II. PROCEEDINGS BEFORE THE COMMISSION

5. Petition 4418-02 was received on October 31, 2002, and on November 15, 2002 a copy of the pertinent parts was transmitted to the State, with a two-month period to submit information. The petitioners presented additional information or observations on August 12 and October 22, 2003; on January 30, May 4, June 30, and July 27, 2004; April 1 and August 16 2005; on February 15, March 13, and December 11, 2006; and on December 19, 2007. On May 13, 2003; April 16, and March 16, 2004; and February 23 and November 1, 2005 the State submitted its observations. All the information submitted was forwarded to the respective counterpart for their observations.

6. On December 15, 2008 the IACHR repeated a request for information to the State. On October 8, 2009 the State requested that the IACHR furnish "all the information" on the petition, which was transferred to the State on October 19, 2009, with a renewed request for information. The State submitted its final observations on January 8, 2010, which were transferred to the petitioners for their information.

7. Petition 980-03 was received on November 19, 2003 and on July 26, 2004 the Commission proceeded to transmit a copy of the pertinent parts to the State, with a two-month period for submitting information. On November 24, 2004 the State submitted its observations and requested that the petition be set aside since the petitioner and the American School of Guayaquil (hereinafter "American School") had agreed on an out-of-court settlement. This communication was forwarded to the petitioner on December 22, 2004, for his observations.

8. On May 29, 2009 the IACHR repeated its request to the petitioner for observations. On June 24, 2009 the petitioner sent his response, which was forwarded to the State for its observations. On August 11, 2009 the State submitted its response, which was forwarded to the petitioner for his information. On April 30, 2001 the petitioner provided additional information, which was sent to the State. On June 3, 2010 the State sent additional observations, which were sent to the petitioner for his information.

## III. POSITIONS OF THE PARTIES

### A. Position of the petitioners

#### 1. Joint allegations

9. The petitioners allege that the alleged victims were students at the American School of Guayaquil until the 1999-2000 school year. They allege that the American School unilaterally increased the cost of monthly fees in April and May 2000 to a sum amounting to between 65-90% more than the fees for the 1999-2000 school year. In view of this, a group of parents filed a complaint with the Provincial Director of Education (Director Provincial de Educación) of Guayas, the Regulatory Board of Private Education Costs (Junta Reguladora de Costos de Educación Particular) of the Province of Guayas, the Ministry of Education and Culture, the Ombudsman (Defensor del Pueblo) of the Province of Guayas, and various media, against the American School. They allege that, as a result of the complaint, on August 14, 2000 the Regulatory Board of Private Education Costs of the Province of Guayas ruled to set enrollment costs and fees for the 2000-2001 year, and that the parents should be reimbursed for the amount collected in excess.

10. The petitioners allege that, on the basis of that ruling, they requested the school to comply with the decision and that, in retaliation, because they had promoted the complaints, the representatives of the American School arbitrarily refused to enroll the alleged victims for the 2001 and 2002 school year, through official letters dated January 12, 2001 and January 23, 2001.<sup>4</sup> The petitioners

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<sup>4</sup> The petitioner of petition 980-03 sustains that the American School informed him that he had failed to comply with certain school regulations, such as "not interfering individually or collectively in the administrative or technical decisions of the  
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indicate that on January 23, 2001 a group of parents filed a complaint with the Provincial Director of Education of Guayas requesting that urgent measures be taken to sanction the director of the American School, warning her to rectify the decision to expel the students and, accordingly, to proceed to enroll them for the corresponding school year.

11. It is alleged that, by official communication dated February 5, 2001, the Provincial Director of Education of Guayas reported that on January 31, 2001 the director of the American School was informed that her decision to deny enrollment to several students was inadmissible since the students had not committed any disciplinary offenses and that, moreover, refusing enrollment violated legal and regulatory standards related to education. The petitioners allege that on February 22, 2001, the Provincial Director once again requested the American School to enroll the affected students. They allege that, despite this, the American School ratified in an open letter its refusal to enroll the alleged victims, whose representatives had complained about the fee increase.

12. The petitioners allege that they lodged constitutional protection remedies (*recursos de amparo constitucional*) with the Thirtieth Civil Court of Guayaquil<sup>5</sup>, and the Twelfth Civil Court of Guayaquil<sup>6</sup> stating that the refusal to enroll was illegal, unconstitutional, and a violation of the rights of their children. The three remedies were overruled.

13. The petitioners allege that, given these decisions, they filed appeals and that, in response, the Constitutional Court accepted the protection remedies, revoked the rulings, and ordered that enrollment be restored to the claimants. They indicate that the rulings were confirmed and published on November 30, 2001 (case 378-2001-RA)<sup>7</sup> and on January 14, 2002 (case 303-2001-RA)<sup>8</sup>. They allege that, despite those rulings, the American School refused to receive their children.

14. The petitioners allege that, due to the noncompliance with the ruling concerning José Antonio Gómez Tello and Víctor Enríquez Feijóo, they requested the Ministry of Education, the Provincial Director of Education of Guayas and the Department of Education to take measures to enforce the ruling of the Constitutional Court; the last such request was dated September 24, 2002. They allege that they did not receive responses to the requests.

15. The petitioners point out that, in the case of Sussy Ivette and Wendy Estahel Encalada Cherrez, on March 6, 2002 the Twelfth Civil Judge of Guayaquil was requested to enforce the ruling. They allege that on March 7, 2002, this Judge notified the American School of its obligation to comply with the ruling of the Constitutional Court.

16. The petitioners point out that a suit for contempt of court was filed against the authorities of the American School on behalf of Víctor Enríquez Feijóo in which, "after the mysterious disappearance of 51 case documents," the prosecutor issued a judgment that abstained from bringing charges against the defendants since they "had demonstrated their decision to respect the ruling by the Constitutional Court." The petitioners indicate that the same petition was lodged on behalf of José Antonio Gómez Tello and that they received the same response from the prosecutor. They allege that the Public Prosecutor of Guayas (Ministro Fiscal de Guayas) finally filed charges against the defendants.

17. The petitioners hold that on March 21, 2002, a verification action was performed at the site of the American School and the parents who lodged the complaint were barred from entering the

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School [...]" and that the request to enroll his daughters for the 2001-2002 school year had not been accepted in accordance with Art. 223 of the General Regulations of the Education Law, and the administrative autonomy of the educational institution.

<sup>5</sup> Filed by Pedro Pablo Gómez.

<sup>6</sup> Filed on January 25, 2001 by Ernesto Salvador Encalda Sotomayor.

<sup>7</sup> Which includes Víctor Enríquez Feijóo, Sussy Ivette and Wendy Estahel Encalada Cherrez.

<sup>8</sup> Which includes José Antonio Gómez Tello.

school. The petitioners allege that on April 2, 2002, the Twenty-eighth Alternate Notary Public (Notario Suplente Vigésimo Octavo) of Guayaquil Canton drew up testimony in a public instrument regarding the verification action of March 21 as evidence of the refusal by the American School to comply with the ruling of the Constitutional Court. The petitioners allege that on April 29, 2004 the authorities of the American School filed a motion to annul the verification action with the Twenty-fourth Civil Judge of Guayaquil.

18. The petitioners indicate that on December 12 2002, the Director General of the American School lodged a motion with the Constitutional Court to annul the protection ruling (case 378-2001-RA). They indicate that on June 10, 2003, the Constitutional Court overruled the motion to annul because the protection ruling was nonappealable as of the date it was issued.

## **2. Specific allegations of petition 4418-02**

19. In response to the State's allegation that violations had not been shown, since José Antonio Gómez Tello and Víctor Enríquez Feijóo are said to have obtained their high school graduation degrees from the American School and they had debt with the School (see III B.1 *infra*), the petitioners reply that their children were later enrolled in other schools; that José Antonio Gómez Tello was enrolled in the Walt Whitman School for the 2001-2002 school year; that by February 2005, when the State submitted its allegation, the children had not yet obtained their high school degrees, and that it is not true that they had debts with the American School.<sup>9</sup>

20. In response to the State's allegation that domestic remedies had not been exhausted, since the American School submitted a motion to annul the ruling of the Constitutional Court (see III B.1 *infra*), the petitioners reply that "the rulings of the Court are of a final, irremovable, and definitive instance, enforceable, and nonappealable."<sup>10</sup>

21. In view of the State's allegation that the petition was time-barred (see II B.1 *infra*), the petitioners reply that the last date of their requests to the authorities to enforce the rulings of the Constitutional Court was September 24, 2002, and that the petition was submitted on October 31, 2002, within the six-month period stipulated in the American Convention.

22. The petitioners allege that, since the State had not taken measures to sanction the American School, which provides public educational services by delegation of the Ecuadorian State, it violated the rights of the child, equal protection, and judicial protection as provided for in Articles 19, 24 and 25 of the American Convention, relative to its duty to respect the rights established in Article 1(1). Furthermore, the petitioners consider that the State violated the alleged victims' right to humane treatment covered by Article 5 of the American Convention since they suffered moral harm as a result of the aforementioned, and that in fact they had to receive psychological support due to the symptoms of depression induced by not being able to continue studying at the school where they had begun their studies. Finally, they consider that the State violated Article 2 of the United Nations Convention on the Rights of the Child.

## **3. Specific allegations of petition 980-03**

23. The petitioner indicates that before the fees in question were raised, on August 2, 1999, the petitioner had sent an official letter to the Director of the American School, complaining about strange odors that affect the nostrils, seemingly from residues of the industrial processes of nearby factories. He

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<sup>9</sup> From the information provided by the petitioners, it transpires that Ingrid Ivet Gómez Tello (sister of José Antonio Gómez Tello) completed high school at the American School in January 2001. Certification dated 25 January 2001 of the Ministry of Education and Culture, attached to the petitioners' brief dated 16 August 2005.

<sup>10</sup> The petitioners indicate that the Second Chamber of the Constitutional Court confirmed that its rulings are unappealable. Ruling of the Second Chamber of the Constitutional Court dated 10 January 2003. Attached to the petitioners' brief received on 22 October 2003.

alleges that this was reported to the president of the Parents' Central Committee and he was told that if the school did not resolve the matter, actions would be taken with the authorities.

24. The petitioner alleges that on August 26, 1999 he filed complaints with the Department of Environment (Departamento de Ambiente) of Guayaquil and with the Chief of the Department of Environmental Sanitation of the Provincial Health Bureau of Guayas (Departamento de Saneamiento Ambiental de la Dirección Provincial de Salud de Guayas), among others, and that on September 6, 1999, the president of the Board of Directors of the American School Association of Guayaquil expressed to him his concern regarding the complaints that had been made.

25. The petitioner points out that, on behalf of Sussy Ivette and Wendy Estahel Encalada Cherrez, an action for contempt was also filed against the authorities of the American School and that on 24 September 2002 a prosecutor's inquiry was initiated as there were grounds for charging said authorities with the offense of ignoring a ruling of the Constitutional Court.<sup>11</sup> He indicates that on March 28, 2003, the Office of the District Prosecutor (Ministro Fiscal Distrital) of Guayas and of Galápagos issued an indictment against the authorities of the American School. He holds that on June 10, 2003, the Thirteenth Penal Judge of Guayas ordered a dismissal without prejudice both of the proceedings and of the accused, and declared that for the time being, the stage of judgment could not move forward. The petitioner points out that on October 28, 2008, the Fifth Criminal Judge declared a definitive dismissal of the contempt proceedings in favor of the authorities of the American School.

26. Moreover, the petitioner indicates that on October 21, 2002 a petition for moral damages lodged against the authorities of the American School on behalf of Sussy Ivette Encalada Cherrez was declared unfounded. It is noted that said decision was appealed and is said to be pending a decision.

27. The petitioner holds that after not complying with the protection ruling, the authorities of the American School lodged a criminal complaint against the petitioner for perjury. He indicates that a criminal indictment was issued against him, with the preliminary hearing scheduled to take place on August 23, 2004. The petitioner has not presented additional information on the perjury proceedings.

28. The petitioner alleges that, feeling hopeless about obtaining justice, he decided to meet with the authorities of the American School and that they arrived at an arrangement "that freed him from going unjustly to prison." Furthermore, he alleges that his daughters did not obtain their international high school degree from the American School and that "they developed problems due to the frustration they experienced." He alleges that his daughters were subjected to discrimination by the educational center where they studied since they were not allowed to continue their studies there and were refused enrollment for the school year.

29. In the initial petition, the petitioner alleges that since the State has not adopted measures to ensure compliance with the ruling of the Constitutional Court, it has violated the rights to the protection of honor and dignity, the rights of the child, nondiscrimination, and judicial protection provided for in Articles 11, 19, 24 and 25 of the American Convention with regard to its obligation to respect rights established in Article 1(1). Furthermore, he considers that the State has violated the United Nations Convention on the Rights of the Child.

## **B. Position of the State**

30. The State considers that the petitions do not meet the requirements established in Article 46.1(b) of the American Convention and requests that the Commission declare them inadmissible.

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<sup>11</sup> The petitioner indicates that the offense is stipulated in and punished under the first subparagraph of Article 251 of the Criminal Code of Ecuador.

31. It alleges that the State has had a new constitutional framework since 2008 and that the petitioners may lodge an action for noncompliance under Article 93<sup>12</sup> of the new Constitution, with the Constitutional Court,<sup>13</sup> to enforce the ruling of the Constitutional Court, by means of which material reparations can be made and civil servants penalized for “prolonging the proceedings, as well as the warnings to comply with the resolution [...]”<sup>14</sup>

#### **1. Allegations concerning petition 4418-02**

32. The State alleges that the petition is inadmissible because it was presented after the six-month period established in Article 46.1.b of the American Convention. It alleges that the petition was submitted on November 15, 2002, which is 13 months after the definitive ruling on the protection appeal issued by the Constitutional Court on October 8, 2001. It alleges that the delay should not be exempted for the sake of justice because 13 months is too long a period, which would undermine legal security and the institutional framework of the inter-American system.

33. The State also holds that domestic remedies have not been exhausted. In this connection, it pointed out that in 2003 the American School submitted a motion to annul the ruling of the Constitutional Court on December 12, 2002, alleging a lack of legal standing of the joint representative of the petitioners.

34. The State alleges that no violations of the American Convention that must be attributed to the State had been shown since the alleged victims could have gained access to education at the American School without this right being impaired. It alleges that the proof of this is that José Antonio Gómez Tello and Iván Víctor Enríquez Feijóo obtained their high school degrees from this school despite their large debt with the educational institution.

35. Finally, the State indicates that the director of the American School initiated ordinary proceedings to annul the notarial judgment (*sentencia notarial*) that verified the refusal to enroll the alleged victims; which was resolved by the Twenty-fourth Civil Judge of Guayas who declared it void. The State alleges that the voiding of the judgment means that the evidence giving rise to the petitioners' allegations does not exist, which renders the alleged violation of human rights nonexistent.

#### **2. Allegations concerning petition 980-03**

36. The State alleges that the petition is inadmissible because the domestic remedies have not been exhausted and the claim does not characterize a violation to the American Convention. In this regard, it notes that the petitioner and the American School arrived at an out-of-court settlement concerning the domestic legal actions that were proposed and that “they agreed that no claims are pending between them, which renders all proceedings undertaken groundless.”

### **IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY**

#### **A. Competence**

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<sup>12</sup> The State refers to Article 93 of the Constitution of 2008: “The purpose of the action for noncompliance will be to guarantee application of the standards of the legal system, as well as compliance with rulings or the reports of international human rights organizations, so long as the rule or decision for which compliance is being sought contains a clear, express, and enforceable obligation to do or not to do so. The action will be filed with the Constitutional Court.” Note 4-2-202/2009 of the Ministry of External Relations of the Republic of Ecuador, received on August 11, 2009.

<sup>13</sup> The State refers to subparagraph 5 of art. 436 of the Constitution of Ecuador regarding the duties and attributes of the Constitutional Court. Note 4-2-202/2009 from the Ministry of External Relations of the Republic of Ecuador, received August 11, 2009. *Cfr.* Note 4-2-03/2010 from the Ministry of External Relations of the Republic of Ecuador, received on January 8, 2010.

<sup>14</sup> Note 4-2-202/2009 from the Ministry of External Relations of the Republic of Ecuador, received August 11, 2009. *Cfr.* Note 4-2-03/2010 from the Ministry of External Relations of the Republic of Ecuador, received on January 8, 2010.

37. According to Article 44 of the American Convention, the petitioners are authorized, in principle, to file petitions to the Commission. According to the petition, the alleged victims are individuals for whom the Ecuadorian State has committed to respect and guarantee the rights enshrined in the American Convention. With regard to the State, the Commission indicates that Ecuador has been a state party to the American Convention since December 8, 1977, when it deposited its instrument of ratification, and to the Protocol of San Salvador since March 25, 1993. Accordingly, the Commission has jurisdiction *ratione personae* to examine the petition.

38. Furthermore, the Commission is competent *ratione loci* to take cognizance of the petitions, inasmuch as they allege violations of rights protected under the American Convention and the Protocol of San Salvador, said to have taken place within the territory of Ecuador, a State party to those treaties. The Commission has jurisdiction *ratione temporis* inasmuch as the obligation to respect and guarantee the rights protected under the American Convention and the Protocol of San Salvador were already binding upon the State when the facts alleged in the petition were said to have occurred. The Commission also has jurisdiction *ratione materiae* because the petitions denounce possible violations of human rights protected under the American Convention. In turn, on the basis of Article 19(6) of the Protocol of San Salvador, the Commission is competent to analyze facts that may be linked to a violation of Article 13 of that instrument. Furthermore, the IACHR has decided that it does not have jurisdiction *ratione materiae* to rule on alleged violation of treaties or other international instruments adopted by the United Nations, although it may take them into account in order to interpret and apply those regional instruments.

## **B. Admissibility requirements**

### **1. Exhaustion of domestic remedies**

39. Article 46(1)(a) of the American Convention requires remedies available under domestic law to have been exhausted in accordance with generally recognized principles of international law, as a requirement for admitting claims on alleged violations of the American Convention. This rule was conceived to allow national authorities to be informed of the alleged violation of a protected right and, if appropriate, to solve it before it is seen by an international body.

40. In the case of the present petition, the State alleges lack of exhaustion of the special protection action, regarding petition 4418-02, and of the motion for noncompliance, punishable under the 2008 Constitution, in the case of the two petitions. For their part, the petitioners allege that, concerning petition 4418-02, they exhausted the protection remedy and requested the Ministry of Education, the Provincial Director of Education of Guayas and the Department of Education to enforce the ruling of the Constitutional Court. Moreover, they filed contempt actions against the authorities of the American School. Concerning petition 980-03, the petitioners allege that they requested the Twelfth Civil Judge of Guayaquil to enforce the ruling of the Constitutional Court and that they lodged a series of complaints against the authorities of the American School.

41. In view of the positions of the parties and the circumstances of the two petitions, the IACHR considers it pertinent to determine the appropriate remedy in relation to the present claims on the possible responsibility of the State for its alleged inaction to enforce the protection rulings issued by the Constitutional Court. The Commission has established that, in order to meet the requirement of exhaustion of domestic remedies, the petitioners need only exhaust the appropriate, that is, the available and effective remedies for solving the denounced situation.

42. In petition 4418-02, the petitioners filed constitutional protection remedies that were rejected. Through an appeal against those decisions, the Constitutional Court accepted the protection remedy, overturned the rulings, and ordered the affected students to be readmitted by the American School of Guayaquil, in decisions published on January 14, 2002 and on November 30, 2001. In light of the refusal of the American School to comply with the orders of the Constitutional Court, the petitioners of petition 4418-02 requested the Ministry of Education, the Provincial Director of Education of Guayas, and the Department of Education to enforce same. The last of their enforcement requests was dated September 24, 2002, to which they did not receive a response. Moreover, they filed contempt remedies against the authorities of the American School and the Prosecutor failed to charge the defendants.

43. In turn, the petitioner of petition 980-03 requested the Twelfth Civil Judge of Guayaquil to enforce the ruling and filed contempt suits against the authorities of the American School. In the context of these charges, the petitioner and Sussy Ivette Encalada Cherrez filed moral harm and perjury charges against the authorities of the American School which, in turn, filed perjury charges against the petitioner. Some were overruled, while others were pending decision.

44. The Commission observes that the rulings that admitted the protection remedies in favor of the alleged victims are said not to have been executed, and that this situation has affected them on a continuous basis. The State has not disputed noncompliance with the rulings of the Constitutional Court. In this regard, the Commission observes that, as general rule, a proceeding should be carried out promptly in order to protect the rights of the interested party. The Inter-American Court has established that the timing for deciding on domestic remedies should be adapted to the purposes of the international protection system and should not result in halting the international proceeding or delaying it so long as to render it useless.<sup>15</sup>

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<sup>15</sup> I/A Court HR, *Velásquez Rodríguez Case*. Judgment of 29 July 1988, Series C No.1, para. 64.

45. With regard to the legal nature of the decisions of the Ecuadorian Constitutional Court, on earlier occasions the Commission found that they are “legally binding on the parties or society as a whole, as appropriate. In reality, both by their formation and by their effect, these decisions constitute judgments since they are procedural acts that have the effect of *res judicata* and there is a coercive element in the event of noncompliance. [...] The Constitutional Court is the supreme organ of constitutional justice and [...] its decisions are not appealable and must be obeyed by all State officials, government bodies, and natural and juridical persons.”<sup>16</sup> The Commission also notes that in both petitions, the petitioners submitted various applications to the authorities requesting enforcement of the rulings and also filed contempt remedies.

46. The Commission has previously expressed that, in order to meet the exhaustion requirement of local remedies, petitioners need only exhaust the available and effective remedies, to remedy the denounced situation. The Commission observes that in light of the refusal of the authorities of the American school to enroll the alleged victims, the petitioners exhausted the appropriate remedy, constitutional protection, and that from the moment of the rulings, took a series of steps, especially numerous requests to the courts for enforcement.

47. In this regard, the Commission observes that the filing of the protection remedy produced rulings that favored the alleged victims and it is not under dispute that said remedy was, in principle, the appropriate remedy for addressing the non-enrollment of José Antonio Gómez Tello, Iván Víctor Enríquez Feijóo, Sussy Ivette, and Wendy Estahel Encalada Cherrez. In the present case, it is not evident and the State has not explained why it would be reasonable to require the petitioners to file independent and additional appeals to enforce the protection ruling, especially since these actions did not exist until the 2008 Constitution entered into force.

48. As a result, given the characteristics of the present petition and the alleged noncompliance with the protection rulings in favor of the alleged victims, the Commission considers that the petitioners' claim meets the requirement of exhaustion of domestic remedies provided for in Article 46.1(a) of the American Convention.

49. By its nature and purpose, Article 46(1)(a) is a standard with autonomous content *vis à vis* the substantive standards of the Convention. Thus, the determination on exhaustion of domestic remedies applicable to the case in question should be carried out before and separately from the analysis of merits, since it depends on a different standard of appraisal than is used to determine a possible violation of Article 25 of the American Convention. It should be noted that the causes and effects of the exhaustion of the aforementioned legal remedies will be examined in the report adopted by the Commission on the merits of the dispute, in order to determine if they constitute violations to the American Convention.

## **2. Deadline for submitting the petition**

50. The American Convention establishes that, for a petition to be admitted by the Commission, it should be lodged within a period of six months after the alleged victim has been notified of the final judgment. Article 32 of the Regulations of the Commission establishes that in cases where exceptions to the exhaustion of domestic remedies are applicable, the petition must be submitted within a reasonable period of time, at the criterion of the Commission. Accordingly, the Commission should take into account the date on which the alleged violation of the rights occurred and the circumstances of each case.

51. In regard to this admissibility requirement, the State alleges that petition 4418-02 was presented to the Commission on November 15, 2002, that is, 13 months after the final ruling by the Constitutional Court on the protection remedy, and published on October 8, 2001 and that, consequently, the petitioners' claim is untimely. With regard to the State's position, it should be pointed out that, as

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<sup>16</sup> IACHR, dmissibility Report No. 10/04, Petition 71/02, Fadia Aucar Daccach, 26 February 2004, para. 35.

determined by the IACHR, the rulings of the Constitutional Court are not appealable and should be complied with immediately<sup>17</sup> by all State officials and that, in the present petition, the protection rulings published on November 30, 2001 and on January 14, 2002, are said to have not been executed to date by the corresponding authorities, which means that the alleged violation would be continuous. In this connection, the IACHR has determined in previous cases that the concept of timely submittal applies differently to charges of alleged noncompliance with nonappealable judicial sentences that can constitute a continuous violation of the right to effective judicial protection.<sup>18</sup>

52. The Commission observes that petitions 4418-02 and 980-03 were received on October 31, 2002 and on November 19, 2003, respectively, and that the facts that gave rise to the charges occurred as a result of noncompliance with rulings of the Constitutional Court published on November 30, 2001 and on January 14, 2002, and that despite numerous requests for enforcement submitted by the petitioners to the responsible authorities, they are said to have not been carried out, which means that the alleged violation would be continuous.

53. As a result, given the context and the characteristics of the present petitions, as well as the different measures undertaken by the petitioners after the ruling to have it enforced, and the fact that it was not enforced, the Commission considers that the petitions were presented on a timely basis and that the admissibility requirement concerning the term for submittal should be considered satisfied.

### **3. Duplication of proceedings and international *res judicata***

54. The case file does not contain information suggesting that the subject matter of the petitions is pending before any other international arrangement for settlement, nor does it reproduce a petition that has already been examined by this or any other international body. Therefore, it can be concluded that the requirements established in the Articles 46(1)(c) and 47(d) of the Convention have been satisfied.

### **4. Colorable claim**

#### **A. Petition 4418-02**

55. The State alleges that the alleged violations of the American Convention attributable to the State have not been characterized since the alleged victims were said to have been readmitted to the American School and obtained their high school degrees from it. The petitioners, in turn, reply that the alleged victims studied at other schools. Finally, the State alleges that the American School initiated ordinary proceedings to annul the notarial judgment that verified the refusal to enroll the alleged victims, and that said judgment was declared void. The State alleges that said annulment renders the alleged violation of human rights nonexistent. For the purposes of admissibility, the IACHR does not have sufficient evidence for the parties' opposing allegations regarding the alleged victims' readmission to the American School.<sup>19</sup> Consequently, the Commission considers that this matter should be examined in the merits stage.

56. Given the factual and legal evidence submitted by the parties and the nature of the subject matter submitted for consideration, the Commission considers that, for the purposes of the present petition, a determination needs to be made of whether the allegations of the petitioners related to

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<sup>17</sup> Art. 58 of the Basic Law on Constitutional Control.- "Rulings issued while processing a protection remedy are to be complied with immediately by the public official or authority to whom the ruling is addressed; to the contrary, the official or authority that fails to comply with the resolution will compensate the plaintiff for the damages caused by the noncompliance."

<sup>18</sup> IACHR, Report No 89/99, Petition 12.034, Admissibility, Carlos Torres Benvenuto *et al*, Peru, September 27, 1999, para. 22 and 23, Report No 75/99, Petition 11.800, Admissibility, Cabrejos Bernuy, Peru, May 4, 1999, para. 22, and Report No. 17/09, Petition 461-04, Adriana Victoria Plaza Orbe and Daniel Ernesto Plaza Orbe, Ecuador, March 19, 2009, para. 39.

<sup>19</sup> The petitioners furnished a certificate of studies for the 2001-2002 school year for José Antonio Gómez Tello from the Walt Whitman School. Petitioner's brief dated August 16, 2005.

the alleged violation of humane treatment and judicial protection could characterize *prima facie* violations of the rights protected under Articles 5 and 25 of the American Convention, pursuant to its Article 1(1).

## **B. Petition 980-03**

57. The State alleges that the alleged violations to the American Convention have not been characterized, given the out-of-court settlement signed by the members of the Encalada Cherrez family and the authorities of the American School. The petitioner alleges that because he had lost hope of obtaining justice, he decided to approach the authorities of the American School whereupon they arrived at a transaction that “freed him from going unjustly to prison,” that his daughters did not obtain their international high school degrees from the American School, and that “they developed problems due to the frustration they experienced.”

58. The Commission notes that on August 24, 2004, the Encalada Cherrez family and the representatives of the American School signed an out-of-court settlement in which it was agreed that the members of the Encalada Cherrez family “have no complaints against the American School of Guayaquil [...] related to the matters stated in this instrument<sup>20</sup> or any other matter that could have arisen as a consequence of the relationship between the parties, which is why they expressly discontinue the legal proceedings in place against the aforementioned institutions and their representatives, and they also expressly agree to renounce initiating any legal actions for these reasons. [...]” Furthermore, the representatives of the American School declared that “they have no complaints, in the present or the future” against the members of the Encalada Cherrez family [...],” meaning that they expressly renounce initiating any legal proceedings for these reasons.<sup>21</sup>

59. In view of the factual and legal information submitted by the parties regarding the alleged failure to adopt measures to comply with a protection ruling issued by the Constitutional Court, the Commission will evaluate the admissibility of the present petition without detriment to the out-of-court settlement signed by the family of the alleged victims and the American School, since compliance with a ruling of the Ecuadorian Constitutional Court it is not subject to the parties’ participation in this private agreement.

60. Because the lack of grounds or inadmissibility of these aspects of the claim are not evident, the Commission considers the requirements set forth in Articles 47(b) and (c) of the American Convention to be satisfied. In connection with the allegation regarding alleged violations of the right to honor and dignity protected under Article 11 of the American Convention, the allegations of the petitioner have not been duly accounted for in the petition; therefore, it is determined that these claims are inadmissible.

## **C. Colorable claim of petitions 4418-02 and 980-03**

61. The Commission considers that it is necessary to determine whether the allegations of the petitioners regarding the alleged violation of the rights of the child and to judicial protection could characterize *prima facie* violations of the rights protected under Articles 19 and 25 of the American Convention pursuant to its Article 1(1).

62. With regard to the alleged violation of Article 19, in accordance with the standards of interpretation established in the American Convention on Human Rights,<sup>22</sup> as well as the criteria

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<sup>20</sup> This refers to the legal proceedings described in the position of the petitioner.

<sup>21</sup> Out-of-court settlement dated August 24, 2004 attached to Note 4-2-202/2009 of the Ministry of External Relations of the Republic of Ecuador, received August 11, 2009.

<sup>22</sup> American Convention Article 29. Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as: [...] b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party; [...] IACHR Report No. 17/09, Petition 461-04, Adriana Victoria Plaza Orbe and Daniel Ernesto Plaza Orbe, Ecuador, March 19, 2009, para. 44.

established by the Inter-American Court of Human Rights with regard to the trend to integrate the regional system with the universal system,<sup>23</sup> and with regard to the notion of *corpus juris* as relates to children,<sup>24</sup> the Commission will interpret the scope and content of the rights said to have been violated to the detriment of the alleged victims.

63. Neither the American Convention nor the IACHR Rules of Procedure require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. Instead, it is for the Commission, based on the system's jurisprudence, to determine in its admissibility report which provisions of the relevant Inter-American instruments are applicable and could be found to have been violated if the alleged facts are proven by satisfactory evidence and legal argument.

64. In the present petition, the Commission observes that the Ecuadorian legislation in force at the time of the relevant facts held that education is an inalienable right of the people and guaranteed private education.<sup>25</sup> Ecuadorian legislation also stipulated that private educational institutions would be governed, for their operation, by the provisions of the Education Law and its Regulations, that they must be authorized by the Provincial Director of Education of each jurisdiction, and must use the official study plans and curricula, adopt the official nomenclature of the educational system, and use the forms, records, and other documents established by the Ministry of Education.<sup>26</sup> The Commission notes that the Ecuadorian State, through the Ministry of Education, is responsible for safeguarding compliance with legal and regulatory provisions by private educational institutions.<sup>27</sup> In view of the foregoing, the Commission finds that the allegations of the petitioners may be heard in relation to the alleged victims' access to education, pursuant to Article 13 of the Protocol of San Salvador.<sup>28</sup>

65. Because the lack of grounds or inadmissibility of these aspects of the claim are not evident, the Commission considers the requirements set forth in Articles 47(b) and (c) of the American Convention to be satisfied. In connection with the allegation regarding alleged violations of the right to equal protection under the law, protected by Article 24 of the American Convention, the allegation of the petitioners has not been duly characterized in the petition; therefore, it is determined that this claim is inadmissible.

66. Finally, the facts of the present petitions concern noncompliance with the rulings of the Constitutional Court of Ecuador on charges filed against the American School of Guayaquil due to the increase in fees in the year 2000. The Commission is presently examining the merits stage of case 12.698 (Adriana Victoria Plaza Orbe and Daniel Ernesto Plaza Orbe), which also concerns noncompliance with a judgment of the Constitutional Court of Ecuador on the same increase in enrollment fees. In light of the relationship between the cases, the Commission considers that an overall

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<sup>23</sup> IACHR, Advisory Opinion OC 1/82 dated September 24, 1982 on other treaties subject to the advisory function of the Court (art. 64 of the American Convention on Human Rights) para. 41. The Commission notes that the Ecuadorian State ratified the United Nations Convention on the Rights of the Child on March 23, 1990. IACHR, Report No. 17/09, Petition 461-04, Adriana Victoria Plaza Orbe and Daniel Ernesto Plaza Orbe, Ecuador, March 19, 2009, para. 44.

<sup>24</sup> IACHR, *Villagrán Morales et al.* Judgment of November 19, 1999, Series C No. 63, para. 194. *Case of the Juvenile Reeducation Institute.* Judgment of September 2, 2004, Series C No. 112, para. 148, *Case of the Gómez Paquiyauri Brothers.* Judgment of July 8, 2004, Series C No. 110, para. 166. IACHR, *Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02* of August 28, 2002, Series A, No. 17, para. 24, 37, 53. IACHR Report No. 17/09, Petition 461-04, Adriana Victoria Plaza Orbe and Daniel Ernesto Plaza Orbe, Ecuador, March 19, 2009, para. 44.

<sup>25</sup> Art. 66 of the Constitution of Ecuador. Official Record N° 1. August 11, 1999.

<sup>26</sup> Education Law No 127. R.O 484: 3-V-83.

<sup>27</sup> See Articles 66 and 67 of the 1998 Political Constitution of Ecuador and Articles 2.e, 166 and 168 of the General Regulations on the Education Law (Decree 935). IACHR Report No. 17/09, Petition 461-04, Adriana Victoria Plaza Orbe and Daniel Ernesto Plaza Orbe, Ecuador, March 19, 2009, para. 43.

<sup>28</sup> IACHR Report No. 17/09, Petition 461-04, Adriana Victoria Plaza Orbe and Daniel Ernesto Plaza Orbe, Ecuador, March 19, 2009, para. 43.

analysis should be performed of the facts in the merits stage of the matter, and therefore decides to join them.

## **V. CONCLUSIONS**

67. The Commission concludes that it is competent to examine the claims submitted by the petitioners on the alleged violation of Articles 19 and 25, pursuant to Article 1(1) of the American Convention, to the detriment of the alleged victims and that they are admissible in accordance with the requirements of Articles 46 and 47 of the American Convention.

68. The Commission also concludes that it is competent to examine the claims submitted regarding the alleged violation of Article 5 of the American Convention, in accordance with its Article 1(1), to the detriment of José Antonio Gómez Tello and Iván Víctor Enríquez Feijóo; and of Sussy Ivette and Wendy Estahel Encalada Cherez.

69. The Commission also considers the possible violation of Article 13 of the Protocol of San Salvador to the detriment of the alleged victims to be admissible. At the same time, it considers the claim concerning the alleged violation of Articles 11 and 24 of the American Convention to be inadmissible.

70. On the basis of the aforementioned factual and legal arguments and without prejudging the merits of the matter,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

**DECIDES:**

1. To declare admissible the claims related to Articles 5, 19, and 25 in conjunction with Article 1.1 of the American Convention and Article 13 of the Protocol of San Salvador.
2. To declare the present petition inadmissible with regard to Articles 11 and 24 of the American Convention.
3. To join the claims with case 12.698 (Adriana Victoria Plaza Orbe and Daniel Ernesto Plaza Orbe).
4. To notify the Ecuadorian State and the petitioners of this decision.
5. To continue to examine the merits of the issue.
6. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 1st day of November 2011. (Signed): Dinah Shelton, President; José de Jesús Orozco Henríquez, First Vice-President; Paulo Sérgio Pinheiro, Felipe González, Luz Patricia Mejía Guerrero, and María Silvia Guillén, Commissioners.