

REPORT No. 14/12
PETITION 670-06
ADMISSIBILITY
CARLOS ÁNDRES RODRÍGUEZ CÁRDENAS AND FAMILY
ECUADOR
March 20, 2012

I. SUMMARY

1. On June 30, 2006 the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition submitted by Patricia Carola Cárdenas Sánchez and the Permanent Committee for the Defense of Human Rights (hereinafter “the petitioners”) arguing the responsibility of the Republic of Ecuador (hereinafter “the State” or “Ecuador”) for the death of the child Carlos Andrés Rodríguez Cárdenas (hereinafter “the alleged victim”), due to improper medical treatment, and the failure of the staff of a public hospital, located in the city of Guayaquil- Guayas Province, to monitor the child’s condition after a surgery, as well as the failure to conduct an effective investigation to prosecute and punish those responsible.

2. The petitioners contend that the State is responsible for violating the rights contained in Articles 4 (right to life), 5 (right to humane treatment), 13 (freedom of thought and expression), 17 (rights of the family), 19 (rights of the child), 24 (right to equal protection), 8 (right to a fair trial) and 25 (right to judicial protection), in connection with the obligation to respect and guarantee the rights contained in Article 1.1 of the American Convention on Human Rights (hereinafter the “American Convention”). In this respect, they claim that the petition is admissible given that they have exhausted the domestic remedies by submitting a cassation appeal to the Supreme Court of Justice. The State, in turn, argues that the petition is inadmissible due to the fact that it was submitted after the six-month period referred to in Article 47 a) of the American Convention, and failed to establish potential violations of the American Convention in accordance with Article 47 b), given that the domestic courts issued a decision and the Commission may not act as a “fourth instance”.

3. After analyzing the positions of the parties and in accordance with the requirements under Articles 46 and 47 of the American Convention, the Commission decides to declare the case admissible for the purpose of examining the alleged violation of the rights of the alleged victim as enshrined in Articles 4 and 19 in connection with Article 1.1 of the American Convention, as well as the rights of the alleged victim’s relatives as contained in Articles 5, 8, 13, and 25, consistent with Articles 1.1 and 2 of the above mentioned instrument. However, the Commission declares the petition inadmissible with respect to Articles 17 and 24 of the American Convention. The Commission also decides to inform the parties of this decision, to publish it, and to include it in its Annual Report to the General Assembly of the OAS.

II. PROCESSING BY THE COMMISSION

4. The IACHR received the petition on June 30, 2006 and after a preliminary examination assigned it the number P-670-06. The IACHR also received additional information on September 7, 2006. The petition and the additional information were forwarded to the State on August 28, 2008, granting the State a period of two months to submit its observations. The State sought an extension on October 3, 2008, which the Commission granted. The IACHR received the State’s response on January 6, 2009 and forwarded it to the petitioners for their observations.

5. The petitioners submitted observations and information on October 23, 2007, November 4, 2008, February 12, 2009, July 8, 2009, November 24, 2009, June 7, 2010, February 8, 2011, and March 1, 2011. The State submitted observations on September 26, 2009. The additional information and observations submitted by the parties were duly forwarded to each of them.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

6. The petitioners asserted that on November 14, 2002, the child Carlos Andrés Rodríguez Cárdenas, aged one year and 11 months, was playing at approximately 5:30 p.m. when he fell to the floor and injured his nose. They added that when Carlos Andrés Rodríguez Cárdenas began to bleed his mother decided to take him to the “Roberto Gilbert Elizalde” public hospital in Guayaquil so they could examine him and determine whether the wound needed suturing.

7. They indicated that the alleged victim arrived at the public hospital at about 6:30 p.m. but was not allowed to enter the emergency room and thus had to wait to receive medical care. The petitioners indicated that the alleged victim was seeing by Dr. Jessenia del Pilar Oyarvide Díaz, who did his medical history. They stated that at that point the alleged victim had stopped bleeding and was playing.

8. The petitioners indicated that about 9:30 p.m. the alleged victim entered the emergency room so that Dr. Víctor Hugo Montalván Cacao could assess whether his nose needed to be sutured. They stated that that doctor told Dr. Jessenia del Pilar Oyarvide to suture it with one or two stitches, as that would be enough. The petitioners stated that at about 12:20 a.m. on November 15, 2002, Dr. Jessenia del Pilar Oyarvide informed the alleged victim’s mother that they were going to suture him and would bring her son back in 20 minutes, and that she could not enter the respective area because it was sterilized. They alleged that the public hospital never informed the alleged victim’s mother that her son would later go into surgery or that he would be given general anesthesia.

9. In addition, the petitioners stated that at about 3:20 a.m. on November 15, 2002, Dr. Jessica Támara León Costales told the alleged victim’s mother that the doctors would come out to inform her about her son. They argued that 20 minutes later a doctor informed the alleged victim’s mother that her son had suffered cardiopulmonary arrest and was in a coma. They added that the alleged victim’s mother was able to see her son until approximately 7:00 a.m. on November 15, 2002. The petitioners reported that Carlos Andrés Rodríguez Cárdenas died on December 4, 2002, after having been in a coma for several days.

10. The petitioners stated that: while the alleged victim was in a coma, his mother was mistreated by the staff of the public hospital; the mother contacted Dr. Iván Heder Morales Mayorga and Dr. Hugo Lara Romero, Chief of Anesthesiology, who told her they did not understand what had happened since “everything was done properly;” the mother had an interview with Dr. Luis Enrique Valenzuela Baquerizo, Director of the “Roberto Gilbert Elizalde” Hospital, who begged her not to “make a big fuss” because “it would damage the hospital’s image;” the employees at the public hospital kept the press from entering the facility; and an attorney from an unknown source offered the mother a blank check on which she could enter the amount she wanted in order to reach a financial agreement.

11. The petitioners indicated that the mother reported what had happened to the Office of the Public Prosecutor, which opened an investigation on November 22, 2002. They stated that the investigation was concluded on March 10, 2003 when the prosecution filed a complaint for manslaughter against Dr. Gustavo Vicente Bernal Encalada and a dismissal in favor of Dr. Juan Bautista Aguirre Balladares. They reported that Dr. Gustavo Vicente Bernal Escalada and Dr. Juan Bautista Aguirre Balladares acted as the anesthesiologist and surgeon, respectively, during the surgery on the alleged victim. They added that on September 8, 2003 the District Prosecutor confirmed the prosecutor’s complaint against Dr. Gustavo Vicente Bernal Encalada as the person probably responsible for the crime of involuntary manslaughter due to medical malpractice.

12. They stated that in March 2004, the Nineteenth Criminal Judge issued a permanent dismissal of the accused and a provisional dismissal of the proceeding, concluding that there was no negligence on the part of the accused given that the pulmonary crisis occurred 30 minutes after the anesthesia was administered. However, according to the dismissal order, that court asserted that the

pulmonary crisis “could have been reversed if it had been noticed in time and observed that it wasn’t noticed due to negligence and neglect attributable to the hospital administration, which failed to monitor the victim or assign medical staff in the observation and recovery area” and that “a better investigation could establish the scope of the hospital’s responsibility and such investigation should be objective, immediate, and urgent.”

13. The petitioners stated that the dismissal of March 2004 was challenged by the mother through an appeal, which was declared inadmissible on the grounds that she had not established herself as a party to the proceeding due to the untimeliness of the individual charge she filed. They stated that the mother challenged that decision through an appeal on points of fact submitted to the First Chamber of the Superior Court of Guayaquil and that finally she submitted a cassation appeal to the Supreme Court of Justice, which declared on April 27, 2006 that the First Chamber of the Superior Court of Guayaquil had acted in accordance with the law. They stated that the Public Prosecutor’s Officer did not appeal the permanent dismissal order of March 2004.

14. With respect to the prior exhaustion of domestic remedies requirement, they argued that the petition was submitted within the period of six months established in Article 46.1.b of the American Convention. They pointed out that for purposes of complying with this admissibility requirement, the period should be counted from the date of the decision issued by the Supreme Court of Justice on April 27, 2006. They also argued that the “fourth instance” formula does not apply, in that the State was unable to administer justice in the case where a child died due to medical negligence in a public hospital, allowing that situation to go unpunished.

15. The petitioners alleged that the State is responsible for violating Articles 4 and 19 in connection with Article 1.1 of the American Convention, in that the medical staff of the public hospital did not take basic precautions to protect the alleged victim and this behavior resulted in his death.

16. They argued that the State is responsible for violating Articles 8 and 25 in connection with Article 1.1 of the American Convention because the Office of the Public Prosecutor should have appealed the order to dismiss issued by the judge in the first instance and should have pursued the criminal investigation. They added that the State is also responsible given that the judicial authorities rejected the appeal submitted by the mother because, contrary to what the judge ruled, the mother had duly established herself as a party to the proceeding in the time period established for this. The petitioners sustained that the mother of the alleged victim filed her individual charge before the reform of the criminal procedure laws took effect. They also argued that the alleged victim’s mother was improperly penalized for having submitted the appeal on points of fact and for having exercised her right of defense.

17. They claim that the State is responsible for violating Article 17 in connection with Article 1.1 of the American Convention, due to the fact that the State’s omissions, that led to the death of the alleged victim and the State’s omissions in the judicial sphere, caused intense suffering to the victim’s parents and siblings.

18. They argued that the State is responsible for violating Article 24 in connection with Article 1.1, in that children in Ecuador, unlike adults, do not have equal protection under the law, as indicated by the way in which the criminal case was decided. The petitioners also argued that the State is responsible for violating Articles 2.1, 2.3, 1.3, and 6.2 of the Convention on the Rights of the Child.

19. They maintained that Ecuador has no specific law to punish medical malpractice and they consider this a violation of the American Convention. Finally, they indicated that the State violated Articles 5 and 13 of the American Convention with respect to the right to humane treatment and access to information, respectively.

B. Position of the State

20. The State maintained that the IACHR is not competent *ratione materiae* to declare violations of the Convention on the Rights of the Child and thus asks that it declare the petition inadmissible with respect to alleged violations of that international convention.

21. The State argued that the relatives of the presumed victim had access to all the remedies that Ecuadorian law provides and maintained that it guaranteed the free and full exercise of judicial guarantees in favor of the alleged victim and his relatives, *inter alia*, their right of defense. It also argued that since criminal law included the definition of “involuntary manslaughter” at the time of these events, there was criminal law to punish “medical malpractice.”

22. With respect to the criminal investigation, the State indicated that the prosecution’s investigative phase began on November 29, 2002 and that the prosecutor issued his report on March 10, 2003, concluding that there was sufficient evidence to try the anesthesiologist, Dr. Gustavo Vicente Bernal Encalada, but not to try the surgeon, Dr. Juan Bautista Aguirre Balladares. The State alleged that the alleged victim’s mother submitted her individual charge on March 18, 2003, eight days after the conclusion of the prosecution’s investigation and after the time provided by law for an interested party to establish herself as a party to the proceeding in the matter.

23. The State indicated that in March 2004 the Nineteenth Criminal Judge of Guayas concluded that the anesthesiologist, Dr. Gustavo Vicente Bernal Encalada, did not commit “medical malpractice” and issued an order of permanent dismissal of the accused and provisional dismissal of the proceeding. It asserted that the alleged victim’s mother challenged that decision by submitting the remedies of appeal and appeal on points of fact. It stated that when ruling in both appeals, the courts concluded that the mother had not established herself as a party to the proceeding in accordance with the current law. Finally, the State indicated that the Superior Court of Justice, when deciding the cassation appeal, concluded that those courts had applied the law correctly and that the criminal procedure reforms, in fact, provided more favorable deadlines and terms for the accused. It maintained that the alleged victim’s mother lost her right to submit briefs and appeals as a party to the proceeding.

24. The State argued that the decision that put an end to the criminal proceeding against the physicians who treated the child was the permanent order of dismissal of March 2004, which was reported on the following day, and alleged that the petition was not submitted in a timely manner given that it was submitted to the IACHR on June 30, 2006, exceeding the period of six months referred to in Article 46.1.b. of the American Convention by two years and five months. It maintained that the remedies subsequently filed by the alleged victim’s mother were not suitable for resolving the legal situation, given that they were not filed in accordance with the criminal law and because the subject of those remedies was the admissibility of the individual charge, so that the decision therein should not be considered for purposes of calculating the deadline. It argued that the alleged victim’s mother filed the suitable remedy by initiating the criminal proceeding.

25. The State argued that the petitioners asked the IACHR to exercise functions beyond the scope of its powers, given that the IACHR cannot function as a “fourth instance” or appellate court. It maintained that the obligation to impart justice is one of means and not of results, so that if the courts did not produce a result satisfactory to the interest of the alleged victim’s mother, this does not mean that its decision are arbitrary. In this respect, the State asked the Commission to declare the petition inadmissible given that no reference was made to facts characterizing violations of the American Convention.

26. Finally, the State alleged on September 26, 2009 that the judicial process continued and promised to send information on the status of the case.

IV. ANALYSIS OF ADMISSIBILITY

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

27. In principle the petitioners are empowered by Article 44 of the American Convention to submit petitions to the Commission. The petition indicates as alleged victims the child Carlos Andrés Rodríguez Cárdenas and his family, with respect to whom the Ecuadorian State committed to respect and guarantee the rights enshrined in the American Convention. Regarding the State, the Commission points out that Ecuador has been a State Party to the American Convention since December 28, 1977, the date on which it deposited its instrument of ratification. Therefore, the Commission is competent *ratione personae* to examine the petition.

28. The Commission is also competent *ratione loci* to hear the petition in that it alleges violations of rights protected in the American Convention that occurred within the territory of Ecuador, a State Party to the convention.

29. The Commission is competent *ratione temporis* in that the obligation to respect and guarantee the rights protected in the American Convention were already in effect for the State on the date the events alleged in the petition occurred.

30. Finally, the Commission is competent *ratione materiae* because the petition reports possible violations of human rights protected by the American Convention. The Commission reminds the parties that, although it is not competent to declare violations of the Convention on the Rights of the Child, that convention is part of the international *corpus juris* regarding the rights of children and adolescents that may be considered for purposes of interpreting the American Convention.¹

¹ IACHR, *Report on Juvenile Justice and Human Rights in the Americas*, OEA/Ser.LV/II, Doc. 78, July 13, 2011, para. 19 and I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A, No. 16, para. 115.

B. Admissibility requirements

1. Exhaustion of domestic remedies

31. Article 46.1 a) of the American Convention requires the prior exhaustion of domestic remedies in accordance with generally recognized principles of international law as a requirement for the admission of complaints regarding the alleged violation of the American Convention. Article 46.2 of the Convention provides that the prior exhaustion of domestic remedies requirement is not applicable when (i) the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have been allegedly violated; (ii) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (iii) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

32. The first step is to clarify which domestic remedies must be exhausted in the instant case. The Inter-American Court has indicated that only remedies suitable for addressing the violations allegedly committed need be exhausted. Adequate remedies means that:

Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable.²

33. For purposes of the admissibility of the instant case, the Commission believes that because the State recognized that at the time of the events its legislation defined public crimes so as to punish “medical malpractice,” it had the obligation to prosecute it *ex officio*. The Commission believes that the facts alleged by the petitioners in the instant case involve the alleged violation of rights contained in the American Convention, which are reflected in domestic law as crimes prosecutable *ex officio* and it is the criminal process driven by the State itself that should be considered for purposes of determining the admissibility of the complaint.

34. The Commission notes that the alleged victim’s mother reported the events; that the Office of the Public Prosecutor initiated a criminal case with a charge of “involuntary manslaughter” against the anesthesiologist and surgeon who treated the child Carlos Andrés Rodríguez Cárdenas; and that the first instance judge dismissed the criminal case with respect to the anesthesiologist and the surgeon. The judge felt that they were not criminally liable with respect to the child’s death, but in the same ruling determined that the death of the alleged victim could have been prevented if the hospital administration had assigned staff to monitor his recovery. In this regard, according to the information provided by the State, the criminal process is still pending, although the Commission has no information regarding specific steps taken following the dismissal.

35. This means that the State recognized in 2009 that the criminal process was continuing but since that time has not sent information on the status of the case. These circumstances indicate an unwarranted delay in accordance with Article 46.2.c of the American Convention. Therefore, the petitioners should be exempt from exhausting the domestic remedies before resorting to the inter-American system in search of protection.

36. It should be made clear that Article 46.2, based on its nature and subject, is an autonomous provision *vis á vis* the substantive provisions of the American Convention. Therefore, the determination as to whether the exceptions to the exhaustion of domestic remedies rule are applicable to the case in question should be made prior to and separate from the analysis of the merits of the case, in

² I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988, Series C, No. 4, para. 63.

that it depends on a standard of assessment different from that used to determine the possible violation of the American Convention.³

2. Deadline for submitting a petition to the Commission

37. The American Convention establishes that in order for a petition to be admitted by the Commission it must be submitted within a period of six months from the date when the alleged injured party was notified of the final decision. In the complaint under analysis, the IACHR has established the applicability of one of the exceptions to the exhaustion of domestic remedies in accordance with Article 46.2 c) of the American Convention. In this regard, Article 32 of the Commission's Rules of Procedure establishes that in cases in which the exceptions to the prior exhaustion of domestic remedies are applicable, the petition must be submitted within a reasonable period of time in the judgment of the Commission. To this end, the Commission must consider the date on which the alleged violation of rights occurred as well as the circumstances of each case.

38. In the instant case, the petition was received on June 30, 2006, the alleged events covered in the complaint began on November 15, 2002, and their effects in terms of the alleged failure to administer justice extend to the present day. In addition, the State recognized in 2009 that the criminal process was still pending. Therefore, in view of the content and characteristics of the instant case, the Commission believes that the petition was submitted within a reasonable period of time and the admissibility requirement with respect to the deadline for submission should be deemed satisfied.

3. Duplication of proceedings and *res judicata*

39. The petition's file contains no information that could lead to a determination that the instant matter is pending in another international proceeding or has been previously decided by the Inter-American Commission. Therefore, the IACHR concludes that the exceptions provided in Articles 46.1 d) and 47 d) of the American Convention are not applicable.

4. Characterization of the alleged facts

40. The IACHR recalls that during this admissibility phase, it must decide whether the petition presents facts that could tend to characterize a violation, as provided in Article 47 b) of the American Convention, and whether the petition is "manifestly groundless or obviously out of order," according to paragraph c) of the same article. The standard for assessing these points is different from that needed to decide on the merits of a complaint. The Commission must perform a *prima facie* evaluation to examine whether the complaint provides the grounds for an apparent or potential violation of a right guaranteed by the Convention and not to establish the existence of a violation. Such examination is a summary analysis that does not imply prejudgment or an advance opinion regarding the merits of the case.

41. In addition, neither the American Convention nor the Rules of Procedure of the IACHR require that the petitioners identify the specific rights alleged to have been violated by the State in the matter submitted to the Commission, although the petitioners may do so. In contrast, the Commission, based on the case law of the system, is responsible for determining in its admissibility reports which provision of the relevant inter-American instruments is applicable and could be concluded to have been violated if the alleged facts are proven through sufficient evidence and legal arguments.

42. The parties in the instant case disagree with respect to the nature of the facts. The State argues that the facts in the case do not characterize a violation of the American Convention, in that the IACHR is not an appeals court and is not competent to review the reasoning of the courts in the instant case, which preserved all the judicial guarantees. For their part, the petitioners argue that the State violated the alleged victim's judicial guarantees and right of access to justice, given that the Office of the Public Prosecutor did not pursue the appropriate investigations; the Office of the Public Prosecutor did

³ IACHR, Report No. 8/11, Petition 302-03, Admissibility, *Anibal Alonso Aguas Acosta and family*, Ecuador, March 22, 2011, para. 54.

not file an appeal against the criminal judge's order of dismissal; and the court improperly rejected the petitioners' appeal.

43. In view of the factual and legal evidence submitted by the parties and the nature of the case submitted for its review, the IACHR believes that the allegations regarding the alleged denial of judicial guarantees and the right of access to justice for the relatives of the alleged victim could, *prima facie*, represent violations of Articles 5, 8, and 25 in connection with Article 1.1 of the American Convention, regarding the lack of effective investigation, prosecution, and punishment of the persons responsible for omitting to monitor the health status of the alleged victim after the surgery.

44. The IACHR also finds that in the instant case it should be established that the petitioners' allegations regarding the alleged State responsibility for the death of the child Carlos Andrés Rodríguez Cárdenas could represent violations of the rights protected in Articles 4 and 19, consistent with Article 1.1 of the American Convention, given that the medical and administrative staff involved belonged to a public hospital.

45. In addition, the IACHR feels that the alleged facts could represent a violation of Article 13 of the American Convention to the detriment of the alleged victim's mother, in view of the alleged lack of information regarding medical treatment and more specifically regarding an opportunity to agree whether or not her son should be operated on and given general anesthesia.

46. Given the standards applied in the instant case, the Commission will analyze in the merits phase whether the law of the State at the time of the events permitted adequate investigation of alleged malpractice for the purpose of punishing those responsible, which could represent a violation of Articles 8 and 25 in connection with Article 2 of the American Convention.

47. In view of the facts and allegations made by the parties, the IACHR believes that they could not represent violations of Articles 17 and 24 of the American Convention.

V. CONCLUSIONS

48. The Commission concludes that it is competent to examine the complaints submitted by the petitioners regarding the alleged violation of Articles 4, 5, 8, 13, 19, and 25, consistent with Articles 1.1 and 2 of the American Convention and in accordance with the requirements established in Articles 46 and 47 of the American Convention.

49. Based on the factual and legal arguments presented above and without thereby implying prejudgment on the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,**DECIDES:**

1. To declare this petition admissible with respect to Articles 4, 5, 8, 13, 19, and 25 in connection with Articles 1.1 and 2 of the American Convention;
2. To declare this petition inadmissible with respect to Articles 17 and 24 of the American Convention;
3. To inform the parties of this decision;
4. To continue with analysis of the merits of the case;
5. To publish this decision and include it in the Annual Report to be submitted to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 20th day of the month of March 2012.
(Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Felipe González, Second Vice-President; Dinah Shelton, Rodrigo Escobar Gil, Rosa María Ortiz, and Rose-Marie Belle Antoine, Commissioners.