

REPORT No. 86/12
PETITION 1201-07
ADMISSIBILITY
ECUADOR
CESAR LORENZO CEDEÑO MUÑOZ AND OTHERS
November 8, 2012

I. SUMMARY

1. On September 15, 2007, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition lodged by Ricardo Fernández de Córdoba of the organization Fernández de Córdoba & Asociados (hereinafter “the petitioner”) on behalf of Cesar Lourenzo Cedeño Muñoz, José Gregorio Rosado Solórzano, Josthyn Andrés Párraga Parrales, Shcarlet Alexandra Flecher Mendonza, and Pedro Alejandro Hildalgo Andrade (all newborns at the time of their death), Cesar Eduardo Cedeño Tapia and Lupe Alexandra Muñoz Cedeño, José Leonidas Rosado Rosado and Rosa Maria Solórzano Loor, Yodry Andrés Párraga Canchinguer and Jacqueline Elizabeth Parrales Zambrano, Boris Fabián Flecher Mendoza and Seida Alexandra Mendoza Tenorio, and Flavio Joselito Renato Hidalgo Ortiz and Karen Patricia Hidalgo Andrade (the parents of those newborn children) (hereinafter “the alleged victims”), alleging that the Republic of Ecuador (hereinafter “Ecuador,” “the State,” or “the Ecuadorian State”) had violated Articles 1.1 (obligation to respect rights), 2 (domestic legal effects), 4 (life), 5 (humane treatment), 17 (rights of the family), 19 (rights of the child), 8 (right to a fair trial), 25 (judicial protection), 26 (progressive development of economic, social, and cultural rights), and 29 (standards of interpretation) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”). Those violations were also related to the violation of Articles VI (establishment and protection of the family), VII (protection for mothers and children), XI (right to the preservation of health and to well-being), and XVIII (right to a fair trial) of the American Declaration of the Rights and Duties of Man (hereinafter “the American Declaration”).

2. The petitioner stated he was the representative of the parents of five newborn children who died in the neonatal nursery of the Napoleón Dávila Córdova Public Hospital in the city of Chone, Manabí province, Ecuador, an agency of that country’s Ministry of Health. He reported that during 2005 and 2006, approximately 29 newborns died in that neonatal nursery, because it was contaminated with *Pseudomonas*, supposedly produced by the poor state of the HVAC system, the low level of cleanliness at the hospital, and a lack of hygiene on the part of the facility’s staff. Regarding admissibility, he claimed that domestic remedies have been exhausted in that the facts were placed before the Public Prosecution Service in 2006, as a result of which the Tenth Criminal Court of Manabí admitted the proceedings and issued a call for a plenary hearing on January 12, 2007. That order was overturned by the Superior Court of Justice of Manabí on March 27, 2007, by means of a temporary dismissal ruling.

3. In turn, the State claimed that it had not been duly established that the bacteria was responsible for the death of the newborn children and that the most suitable conclusion is that the deaths were due to specific medical circumstances and not to an epidemiological outbreak. Regarding the exhaustion of domestic remedies, the State said that if the petitioner thought there were irregularities in the proceedings, he could have examined the possibility of filing a recusal suit during the criminal case, a suit for material and moral damage. It also held that the petitioners’ intent was for the Commission to act as a fourth instance and to examine the errors of the domestic courts.

4. After examining the position of the parties in light of the admissibility requirements set out in Articles 46 and 47 of the Convention, the Commission concluded that it was competent to hear the claim and that the petition was admissible as regards the alleged violation of the rights enshrined in Articles 4.1, 5, 19, 8, and 25 of the American Convention, in conjunction with Article 1.1. thereof. The Commission further found that a separate analysis of Articles 17 and 26 of the American Convention would not be necessary at the merits stage. Consequently, the Commission resolved to notify the parties, to publish this report on admissibility, and to include it in its Annual Report.

II. PROCEEDINGS BEFORE THE COMMISSION

5. On September 15, 2007, the Commission received the initial petition and assigned it the number P-1201-07.¹ On May 6, 2008, in compliance with Article 30.3 of its Rules of Procedure then in force, the Commission sent the State the relevant parts of the petition, along with a request for it to reply within a period of two months. The State returned its response to the petition on September 3, 2008, which was forwarded to the petitioner.

6. On February 6, 2009, and August 3, 2009, the petitioner submitted additional information, which was conveyed to the Ecuadorian State.

7. On March 18, 2009, the State requested an extension of the deadline for returning its comments; accordingly, on March 19, 2009, the Commission granted a one-month extension. On June 2, 2009, the Commission repeated its request for the State to submit information and, on September 11, 2009, the State submitted its comments, which were forwarded to the petitioner.

8. The petitioner submitted additional information on October 16, 2009, which was conveyed to the State. The State submitted its reply on January 4, 2010, in a communication that was forwarded to the petitioner on April 20, 2010.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

9. The petitioner states that over the years 2005 and 2006, approximately 29 newborn children died in the neonatal nursery of the Napoleón Dávila Córdova Public Hospital in the city of Chone, Manabí province, Ecuador, an institution belonging to that country's Ministry of Health. He states he is acting as the representative of the parents of five newborn children who died during that period.

10. He claims that the investigations into the case revealed that the neonatal nursery was infected by *Pseudomonas*, on account of the poorly maintained HVAC system and the general lack of cleanliness at the facility. He reports that the experts also found a large number of cockroaches and bat droppings in the neonatal nursery's false ceilings, and that statements made by the parents of the dead infants indicated the State's lack of concern and the negligence of the public officials. Those statements, he says, report that the medical personnel failed to use the minimum equipment required (masks, hats, etc.) and failed to meet the minimum hygiene requirements for treating and handling the children (for example, that they did not wash their hands, that they ate in the nursery, that they handled two children at the same time, etc.).

11. Regarding the exhaustion of domestic remedies, the petitioner states that criminal proceedings were brought by means of Prosecutorial Inquiry No. 04-05-2006, and that on January 12, 2007, the Twelfth Criminal Court of Manabí admitted the case and called for a plenary hearing for the crime of unintentional homicide. On March 27, 2007, that decision was overturned by a temporary dismissal order in which it was established that there was no material evidence of the offense under investigation or of the criminal responsibility of the accused.

12. In response to the State's contentions (see below), the petitioner claims that a civil action for material and moral damage would not be appropriate, in that the Inter-American Court has ruled that the chief form of redress for violations of the right to life is the determination of individual criminal responsibilities. He adds that it would be difficult for a civil judge to find the existence of reparable damages without the previous determination of criminal (or administrative) responsibility in the matter, and that civil action for damages requires ordinary proceedings that in practice in Ecuador take several years to be resolved and would therefore not be simple or effective.

¹ The Commission had previously received a request for precautionary measures in connection with the facts set out in the petition on May 26, 2006. Accordingly, the Commission sent the Ecuadorian State a request for information on June 20, 2006.

13. He claims that in an attempt to reach a friendly settlement, a request for mediation was lodged with the office of the Attorney General of the State (PGE). That application was filed on July 5, 2007, and, as of the time the petition was presented to the IACHR, no progress had been made with the procedure.

14. The petitioner claims that he has been denied his right of access to justice, in that the remedies afforded by domestic jurisdiction have proved ineffective. He contends that in the case, the State exceeded all reasonable limits since given the abundant evidence in the matter, the case was not particularly complex. He states that the interested parties' procedural activity was constant and that the State has given no reasons or explanations for the length of time that has elapsed.

15. He reports that grave threats were made against the families that brought the criminal proceedings and that, as a result, the relatives of several victims were forced to leave the city of Chone and only the parents of five children have decided to present this petition.

16. He contends that in accordance with the provisions of domestic and international law, by failing to guarantee access to justice, the State is responsible for violating its international human rights obligations. In addition, he maintains that those violations are the responsibility of the Ecuadorian State both because they occurred within a public health facility and because the prosecution service and judiciary failed to impose punishments and order redress.

B. Position of the State²

17. Ecuador maintains that its health system is inadequate largely on account of the limited budget assigned to it, but it claims that those conditions are in "progressive development" and, consequently, there was no failure on the part of the State to observe its obligations and responsibilities. The State notes that the right to health is enshrined in Article 32 of the Ecuadorian Constitution.

18. Regarding the exhaustion of domestic remedies, Ecuador notes that the legal formalities described in the petition indicate problems in dealing with various steps during the criminal proceedings, as a result of which the petitioners could have examined the possibility of filing for a recusal on account of the alleged violation of their rights in the administration of justice. The State notes that such remedies are "enshrined in Ecuadorian law to correct the actions of judges when petitions are not addressed promptly or evidence is not processed adequately, or in response to other irregularities in the development of proceedings." It states that a civil action for material damages could have been brought to correct the alleged facts, in that it is a remedy that is swift and simple and that, if invoked correctly, would lead to compensation and redress. The State also refers to civil proceedings for moral damage as an additional remedy that the alleged victims could also have considered.

19. The State argues that since only five of the parents named as alleged victims sought the intervention of the justice system, a more appropriate interpretation would be that the deaths of the newborn children were due to particular medical circumstances of each case, as indicated by statistics for the city of Chone. It further contends that in the case at hand, it has not been clearly established that the bacteria were a determining factor in the newborn deaths.

20. Ecuador states that with reference to the bacteria *Pseudomonas*, the scientific classification indicates that they are a highly numerous genus and that no species is directly involved in airborne transmission. It also reports that no technique has been validated for conducting a bacterial count in a hospital environment for establishing the number of bacteria (colony forming units) that would be acceptable in such an environment.

² The Commission notes that in addition to the claims summarized in this section, the State maintains that the petitioner is required to provide absolute proof that his rights under Article 7.5 of the Convention were not effectively guaranteed. The Commission is unclear about the State's reasons for making such a reference in that it is not addressed by the substance of the petition.

21. Ecuador contends that *Bravibacillus brevis* can infect humans in exceptional circumstances only. It also states that *Pseudomonas putida* normally inhabits soils and water, is not a part of normal human flora, and is transmitted through exposure to medical devices and medicinal preparations.

22. The State maintains that the American Convention prevents the Commission from acting as an appeals court to examine factual or legal errors in matters reserved to the domestic courts and that, in any event, the Inter-American Court would be the competent body for determining violations of the guarantees of due process.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission *Ratione Materiae*, *Ratione Personae*, *Ratione Temporis*, and *Ratione Loci*

23. The petitioner is entitled, under Article 44 of the American Convention, to file complaints with the Commission on behalf of the alleged victims, who were under the jurisdiction of the Ecuadorian State on the date of the alleged facts. With respect to the State, the Commission notes that Ecuador has been a party to the American Convention since December 28, 1977, when it deposited the corresponding instrument of ratification. The Commission therefore has competence *ratione personae* to examine the petition.

24. The Commission has competence *ratione loci* to deal with the petition since it alleges violations of rights protected by the American Convention occurring within the territory of Ecuador, which is a state party to that treaty.

25. The Commission also has competence *ratione temporis* since the obligation of respecting and ensuring the rights protected by the American Convention was already in force for the State on the date on which the incidents described in the petition allegedly occurred.

26. Finally, the Commission has competence *ratione materiae* since the petition describes possible violations of human rights that are protected by the American Convention. Regarding the alleged violations of rights protected by the American Declaration, the Commission again states that although the Declaration is a source of international obligations,³ after the Convention has come into force for a State, it is that instrument and not the Declaration that is the primary source of law applied by the Commission, provided that the petition addresses the alleged violation of identical rights in both instruments.⁴ In the case at hand, the Commission finds that terms of the Declaration invoked by the petitioner can be subsumed into the analysis of the provisions of the American Convention that it is to perform.

B. Admissibility Requirements

1. Exhaustion of Domestic Remedies

27. Article 46.1.a of the American Convention provides that in order for a petition presented to the Inter-American Commission under Article 44 of the Convention to be admitted, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles

³ IACHR, Report 102/09 (Admissibility), Petition 1380-06, Pensioners of the National Agricultural Development Bank – BANDESA (Guatemala), October 29, 2009, para. 24; IACHR, Report No. 38/09 (Admissibility and Merits), Case 12.670, National Association of Ex-Employees of the Peruvian Social Security Institute and Others (Peru), March 27, 2009, para. 68; I/A Court H. R., *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89 of July 14, 1989, Series A No. 10, paras. 43 to 46.

⁴ IACHR, Report 102/09 (Admissibility), Petition 1380-06, Pensioners of the National Agricultural Development Bank – BANDESA (Guatemala), October 29, 2009, para. 24; IACHR, Report No. 03/01, (Admissibility), Case 11.670, Amílcar Menéndez, Juan Manuel Caride, and Others – Social Security System (Argentina), January 19, 2001, paras. 41 et seq.

of international law. That requirement is intended to facilitate the domestic authorities' examination of the alleged violation of a protected right and, if appropriate, to enable them to resolve it before it is brought before an international venue. In turn, Article 46.2 of the Convention states that the prior exhaustion of domestic remedies shall not be required 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 allegedly been 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.

28. The State claims that the petition is inadmissible because the petitioner did not pursue recusal proceedings and did not exhaust remedies – such as a suit for material and moral damage– before the civil courts. In turn, the petitioner contends that civil action for material and moral damages would not be appropriate, and that criminal channels are the appropriate response for violations of the right to life. The petitioner further maintains that those channels concluded with a temporary dismissal followed by a lack of action on the part of the Public Prosecution Office.

29. The analysis of the exhaustion of domestic remedies must start by determining what remedies must be exhausted, understood as meaning those that are appropriate for resolving the affected legal situation.⁵ The Commission has further established that the requirement to exhaust domestic remedies does not mean that the alleged victims are obliged to exhaust every remedy available to them: both the Court and the Commission have held, on repeated occasions, that “the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means.”⁶ Consequently, if the alleged victim raised the issue by way of any of the valid and suitable options under domestic law, and the State had the opportunity to correct the situation under its jurisdiction, the purpose of the international provision must be considered to have been accomplished.”⁷

30. The Commission notes that the parents of the deceased children sought the involvement of the criminal justice system by reporting the facts to the Public Prosecution Service, which began proceedings for the crime of “unintentional homicide” against several members of the medical and maintenance staff of the Chone Hospital. According to the available information, under Ecuadorian law at the time of the facts, that crime was a publicly actionable offense. The trial judge subsequently called for a plenary hearing, but that ruling was temporarily dismissed by the Superior Court of Justice of Portoviejo on March 27, 2007. According to the information at hand, that mechanism orders the closure of the investigation until new evidence for it to proceed emerges. In his submissions, the petitioner made several references to the “inertia” of the Public Prosecution Service in continuing with the investigation. The State offered no response to those arguments or any justification that could *prima facie* explain why, more than five years after the temporary dismissal, the investigation has not continued. Neither did the State provide any information on administrative or disciplinary investigations or punishments.

31. At the merits stage the Commission will analyze whether the Ecuadorian State provided a remedy with due guarantees to the next-of-kin of the alleged victims *vis-à-vis* the obligations arising from Articles 8 and 25 of the American Convention. However, at this stage in the proceedings, and without prejudging the merits of the case, the Commission believes that the State has incurred in an unwarranted delay in providing an effective remedy to the complaint filed by the parents of the deceased children. Consequently, the Commission concludes that the exception provided for in Article 46.2.c of the American Convention is applicable.

⁵ I/A Court H. R., *Case of Velásquez Rodríguez v. Honduras*, Merits, Judgment of July 29, 1988, Series C No. 4, para. 63.

⁶ I/A Court H. R., *In the Matter of Viviana Gallardo et al.*, Series A No. G. 101/81, para. 26.

⁷ IACHR, Report No. 57/03 (Admissibility), Petition 12.337, Marcela Andrea Valdés Díaz (Chile), October 10, 2003, para.

32. Finally, regarding the recusal remedy referred to by the State, the Commission notes that the State merely indicated that such remedies are admissible against judicial authorities who have committed procedural irregularities in the cases before them. The State does not explain how such a remedy could have resolved the petitioners' central claim, which has more to do with the issuing of a temporary dismissal and the resulting failure to continue with the investigation, in spite of the extensive evidence available. In light of the foregoing, the Commission finds that the petitioner cannot be required to file the recusal action to which the State refers.

2. Filing Period

33. Article 46.1.b of the Convention states that for a petition to be admissible, it must be lodged within a period of six months following the date on which the complainant was notified of the final judgment at the national level. This rule does not apply when the Commission finds that any of the exceptions to the exhaustion of domestic remedies enshrined in Article 46.2 of the Convention applies. In such cases, the Commission must determine whether the petition was presented within a reasonable time, in keeping with Article 32 of its Rules of Procedure.

34. The Commission has established that in the instant case, the unwarranted delay exception provided for in Article 46.2.c of the American Convention is applicable. Bearing in mind the time that has elapsed since the last known development in the proceedings – the temporary dismissal of March 27, 2007 – and the presentation of the petition on September 15, 2007, the Commission concludes that the petition was lodged within a reasonable time and, consequently, that this requirement has been satisfied.

3. Duplication of Proceedings and *Res Judicata*

35. Article 46.1.c of the Convention provides that the admission of a petition is subject to the requirement that the matter “is not pending in another international proceeding for settlement,” and Article 47.d of the Convention stipulates that the Commission will not admit a petition that is substantially the same as one previously studied by the Commission or by another international organization. The parties have not cited the existence of either of those two circumstances, nor can they be inferred from the case documents.

4. Colorable Claim

36. At the admissibility stage, the Commission must decide whether the stated facts could tend to establish a rights violation, as stipulated in Article 47.b of the American Convention, and whether the petition is “manifestly groundless” or “obviously out of order,” as stated in Article 47.c. The standard for assessing those requirements is different from the one used to rule on the merits of a petition. The Commission must conduct a *prima facie* assessment to examine whether the complaint entails an apparent or potential violation of a right protected by the Convention and not to establish the existence of such a violation. That examination is a summary analysis that does not imply prejudging the merits or offering an advance opinion on them.

37. Moreover, neither the American Convention nor the IACHR's Rules of Procedure require the petitioners to identify the specific rights that they claim were violated by the State in a matter placed before the Commission, although the petitioners may do so. In contrast, it falls to the Commission, based on the precedents set by the system, to determine in its admissibility reports what provisions of the relevant inter-American instruments are applicable, the violation of which could be established if the alleged facts are proven by means of adequate evidence.

38. First of all, the State contends that the Commission is not an appeals court for analyzing factual or legal errors that might have been committed by the domestic judicial authorities within the scope of their competence and in compliance with the guarantees of due process. In this regard, the Commission would like to point out that the petition does not seek the review of domestic decisions but

instead addresses alleged actions and omissions by various state authorities that could trigger the international responsibility of the State of Ecuador.

39. Thus, in light of the elements of fact presented by the parties, the Commission believes that the facts described related with deaths that could have been prevented by the State through a proper control and monitoring of the public health institution, could establish the violation of the rights to life and to humane treatment and the rights of the child, enshrined in Articles 4.1, 5, and 19 of the American Convention, in conjunction with the obligations set out in Article 1.1 thereof, with respect to the five newborn children who died in a public hospital. In addition, the Commission believes that the facts described could tend to establish violations of the rights to humane treatment, to a fair trial, and to judicial protection, enshrined in Articles 5, 8, and 25 of the American Convention, in conjunction with the obligations set out in Article 1.1 thereof, with respect to the next-of-kin of the deceased children.

40. In accordance with the standards of interpretation contained in the American Convention,⁸ with the criteria established by the Inter-American Court of Human Rights regarding the trend toward integrating the regional and universal systems,⁹ and with the idea of a *corpus juris* on the rights of children,¹⁰ the Commission will interpret the scope and contents of those rights in light of the pertinent provisions of the Convention on the Rights of the Child.

41. Finally, the Commission believes that the elements presented do not tend to establish a separate violation of the rights of the family or of the progressive development of economic, social, and cultural rights as set forth in Articles 17 and 26 of the American Convention. The arguments offered by the petitioner in connection with those rights may be examined in the study of the merits of the provisions indicated in paragraph 41 of this report. Similarly, Article 29 of the Convention shall be used in the instant case, as in all cases, as a guide for interpreting the State's obligations under the Convention.

V. CONCLUSIONS

42. The Commission concludes that it is competent to examine the claims presented by the petitioners regarding the alleged violation of Articles 4.1, 5, 19, 8 and 25 of the American Convention, in conjunction with the obligations set forth in Article 1.1 thereof, in accordance with the requirements established by Articles 46 and 47 of that same instrument.

43. 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 as regards Articles 4.1, 5, 19, 8, and 25 of the American Convention, in conjunction with Article 1.1 thereof.

2. To declare this case inadmissible with respect to Articles 17 and 26 of the American Convention.

⁸ 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."

⁹ I/A Court H. R., "*Other Treaties*" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982, Series A No. 1, para. 41.

¹⁰ I/A Court H. R., *The Street Children Case (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. I/A Court H. R., *Juridical condition and human rights of the child*, Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, paras. 24, 37, and 53.

3. To notify the parties of this decision.
4. To continue with its analysis of the merits of the complaint.
5. To publish this decision and to include it in its Annual Report, to be presented to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 8th day of November 2012. (Signed): José de Jesús Orozco Henríquez, President; Felipe González, Second Vice-President; Dinah Shelton Rodrigo Escobar Gil, Rosa María Ortiz, Rose-Marie Antoine, Commissioners.