

REPORT No. 85/12
PETITION 381-03
ADMISSIBILITY
S. ET AL.
ECUADOR
November 8, 2012

I. SUMMARY

1. On May 22, 2003, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition submitted by Mrs. María Gloria Cicero Secades alleging responsibility on the part of the Republic of Ecuador (hereinafter “the State” or “the Ecuadorian State” for its failure to decide in a timely manner regarding an international petition for return on behalf of her grandson, the child S. (hereinafter “the alleged victim”),¹ and its failure to take measures to enforce earlier judicial rulings by Ecuadorian judges declaring that return admissible, bearing in mind that at the time of the events the alleged victim was a minor and that his rights to personal integrity and to family have been affected as a result of the State’s failure to proceed with his return in a timely manner. Subsequently, Mrs. Marta Rodríguez Cicero, mother of the alleged victim, established herself as a petitioner before the IACHR.

2. The petitioner maintains that the State is responsible for violating Articles 5, 17, 19, and 25 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) in connection with Article 1.1 thereof. For its part, the State alleges that the petition is inadmissible due to a failure to establish violations of rights established in the American Convention, and that the Commission cannot act as a court of appeal for review of decisions regarding a matter related to the application of standards of private international law, a circumstance that also excludes the IACHR as competent to hear the case.

3. Without prejudging the merits of the matter and after analyzing the positions of the parties and compliance with the requirements of Articles 46 and 47 of the American Convention, the Commission decided to declare the petition admissible for purposes of review of the alleged violation of Articles 5, 8, 17.1, 19, and 25 of the American Convention, consistent with Article 1.1 thereof. It also decided to notify the parties of this decision, to publish it, and to include it in its Annual Report to the General Assembly of the OAS.

II. PROCEEDING BEFORE THE COMMISSION

4. The Commission received the petition and recorded it under number 381/03. After performing a preliminary analysis, on June 9, 2005 the IACHR forwarded to the State the relevant sections of the petition so that it could submit its observations. On August 11, 2005, the State asked for an extension to submit its response, which the Commission granted. On September 12, 2005, the State submitted its response, which was forwarded to the petitioner for her comments.

5. On April 13, 2009, the IACHR asked the parties to submit updated information on the matter. On September 9, 2009, the State asked the Commission to send copy of the file, which was sent on September 11, 2009. The State submitted its response on October 22, 2009, which was forwarded to the petitioner for her comments. On November 4, 2009, the State submitted additional information, which was forwarded to the petitioner for her comments. The petitioner submitted her response on February 2, 2010, which was forwarded to the State for its comments. The State submitted its response in a brief dated April 9, 2010, which was forwarded to the petitioner for her comments. The petitioner submitted her response on June 2, 2010, which was forwarded to the State for its comments. On July 13, 2010, the State submitted its response, which was submitted to the petitioner for her information.

¹ The Commission is keeping the child’s name confidential since he is an 18-year old minor.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

6. According to the petition, S. is the son of Marta Rodríguez Cicero, a Spanish national; and his father is an Ecuadorian national. On September 7, 2001, the competent authority of Spain approved the “agreement governing the separation by mutual agreement” of S’s parents, granting the mother custody of the child and establishing “visitation rights” for the father. The petition alleges that although that decision had established Spain as the child’s domicile and a prohibition on the child’s leaving that country,² in October 2002 - when S. was six years old - “after making use of his visitation day,” the boy’s father took him to Ecuador to stay with him.

7. The petitioner indicates that in response to this she submitted to the “Central Spanish Authority,” a petition for return of S. so that he would be returned to Spain. Subsequently, the Spanish Ministry of Justice proceeded to handle the petition for return of the child with the “Central Ecuadorian Authority,” based on the provisions of the “1980 Hague Convention on the Civil Aspects of International Child Abduction” (hereinafter the “Hague Convention”).³ She states that on January 16, 2003, Ecuador’s National Court of Minors admitted the petition and authorized the President of the Court of Minors No. 1 of Guayas to process the petition for return.

8. The petitioner alleges that Ecuadorian authorities could see from the outset that there was already a firm decision granting custody of the child to the mother and should thus have proceeded to order the measures necessary to enforce the petition for return, complying with the deadlines established for this purpose in the Hague Convention. However, the petitioner maintains that a domestic judicial process was initiated with a contrary purpose in that, based on a petition submitted by the child’s father seeking to revoke the “governing agreement” decided in Spain, the judicial authorities decided to hear the “merits of the matter” relating to the protection and custody of the child, without taking measures to undo the illegal abduction that had been committed.

9. The petitioner maintains that on various occasions during the course of the process the boy’s father recused the judges hearing the case and in this way managed to extend the process unduly before a final decision was reached. These delays are alleged to have occurred without the judicial authorities taking into account the specifics of the case and the speed with which it should have been resolved in the light of the principle of the best interests of the child.⁴

10. Regarding the stages of the judicial process, the petitioner indicates that on February 17, 2004 the Second Judge for Childhood and Adolescence of Guayaquil, in compliance with the provisions of the Hague Convention, ordered that the boy’s father be notified “to proceed to return the minor child within ten days [...] to the city of Vigo, Spain.” The petitioner alleges that the Ecuadorian authorities did not order the measures needed to comply with that ruling⁵ and that, on the contrary, a “de facto appeal”

² The prohibition on the child’s leaving the country was issued bearing in mind that on earlier occasions the child’s father had tried to remove him from Spain.

³ According to the documentation provided by the petitioner, that petition was submitted to Ecuador’s Central Authority on January 8, 2003.

⁴ It is to be noted that during the time the child remained in Ecuador without the order to return having been enforced, at the request of Mrs. Marta Rodríguez, the Spanish authorities communicated with the Ecuadorian authorities several times to express their concern over the delay in processing the matter in Ecuador. They add that the Spanish Ministry of Justice informed the Permanent Bureau of the Hague Conference on Private International Law regarding the “failure of the Ecuadorian authorities to comply with the order to return,” and this body communicated with the President of the National Court of Minors of Ecuador in May 2003 seeking information in this regard and on the reasons for the alleged delay in processing. In this regard, they allege that none of these requests was answered.

⁵ The petitioner indicates that although on March 8, 2004, two INTERPOL agents in Quito had managed to transfer S. to a “center for minors” to comply with the referenced decision, the corresponding court order to proceed with “enforcement” of the petition to return had not been issued, so that the child was returned to his father on the same day.

submitted by S's father was processed, by virtue of which the First Chamber for Labor, Childhood and Adolescence of the Superior Court of Justice of Guayaquil, in a decision dated May 5, 2004, declared null everything that had happened to that point and ordered the process returned to the lower court. The petitioner indicates that on August 18, 2004, a second decision was handed down by the Third Court for Childhood and Adolescence of Guayas declaring the petition for return admissible and ordering the "immediate return" of the child to Spain, for which purpose the court ordered that the competent authorities be empowered to locate the child and arrange his transfer to Spain, in coordination with that country's authorities.

11. The petitioner maintains that despite this final decision, Ecuadorian authorities still failed to take any measures to ensure its enforcement, so the decision was not carried out. The petitioner asserts that after leaving Spain the boy remained with his father for approximately six years, during which time he lived in a "situation of abandonment" without receiving the adequate care he required, particularly in terms of his health.⁶ In this regard, the petitioner alleges that this has damaged the physical and psychological integrity of the alleged victim and that this happened because the State failed to act with due diligence to ensure the child's return to his customary residence with his mother, in compliance with a decision issued by Ecuador's own authorities. She also maintains that, due to the irregularities committed during the referenced proceeding on returning the boy, which ultimately did not occur, no investigation was initiated in Ecuador.

12. Finally, the petitioner explains that S. remained in Ecuador until December 2008, when he "voluntarily left his grandmother's home" and traveled to Spain where he is currently living with his mother.⁷ She adds that on May 27, 2010, First Instance Court No. 5 of Vigo, Spain suspended the visitation regime established in the governing agreement of September 2001. She emphasizes that this decision took into account the statement that S. made to that court indicating his desire not "to have contact with his father."

B. Position of the State

13. In response to the complaint, the State maintains that it should be declared inadmissible in that the facts described do not establish a possible violation of obligations assumed by Ecuador based on the provisions of the American Convention.

14. The State alleges that this case involves a "private family" matter related to a "dispute between the parents of a minor" regarding the custody of the latter, a matter that, given the specifics of the case, should be resolved in accordance with the provisions of private international law. In this respect, it alleges that the Commission is not competent to hear the merits of the process initiated in accordance with the provisions of the applicable convention on international return of minors. It also maintains that according to the fourth instance formula the IACHR cannot act as a court of appeals to question decisions adopted domestically in relation to the enforcement of an order issued by the Spanish authorities to ensure that the alleged victim would be returned to his mother in Spain.

15. It alleges that in any case there would be a possible violation of the Convention with respect to the action of the Ecuadoran authorities to "process and decide" regarding the order on international return of the minor submitted by Spain. In this regard, it maintains that the process initiated on the domestic level was conducted with respect for due process guarantees. It alleges that possible delays occurring during that process are not attributable to domestic judges but to various motions submitted by the child's father that had to be resolved at the time by the competent judicial authorities and that had lengthened the duration of the process.

⁶ The petitioner maintains that, in sporadic telephone conversations she had with her child, he indicated that he "didn't feel loved" by the people with whom he was living, did not receive adequate food, and had been ill-treated by his father and other members of his father's family. She also emphasizes that the child had a "clearly visibly deformity in both feet," because he was not treated in time, his growth had been delayed, and this prevented him from walking correctly.

⁷ The petitioner indicates that since his return to Spain the child has had to receive various medical and psychological treatments.

16. The State alleges that consideration should be given, on the one hand, to the fact that when his father took the boy to Ecuador in 2002, the father committed a “violation of the visitation regime” that had been previously established and, on the other, to the fact that according to the information submitted to the Ecuadorian authorities by the INTERPOL office in Spain in early 2009, the alleged victim had been with his mother in Spain since December 2008, a move that had happened without the Ecuadorian authorities’ having resolved the matter.⁸ In this regard, the State maintains that the possible “physical and psychological instability” of the alleged victim is owing to the way his parents have acted outside the legal order, without considering the best interests of the child, a concept that was, in contrast, actually taken into account by the judicial authorities that heard the matter, ensuring that his rights would be respected and guaranteed.

17. In view of the preceding arguments, the State asks the Commission to declare the referenced petition inadmissible.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

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

18. In principle, the petitioner is authorized by Article 44 of the American Convention to submit petitions to the Commission. The petition indicates as the alleged victim an individual presumably present in the country from 2002 until December 2008, with respect to whom the Ecuadorian State undertook to respect and guarantee the rights enshrined in the American Convention. With respect to the State, the Commission indicates that Ecuador has been a State Party to the American Convention since December 8, 1977, the date when it deposited its ratifying instrument. Therefore, the Commission is competent *ratione personae* to examine the petition.

19. The Commission is also competent *ratione loci* to hear the petition in that it alleges violations of rights protected in the American Convention and taking place within the territory of Ecuador, a State Party to that convention. The Commission is competent *ratione temporis* in that the obligations to respect and guarantee the rights protected in the American Convention were already in effect for the State on the date when the events alleged in the petition would have occurred.

20. In the complaint under review, the State alleges the Commission’s lack of competence *ratione materiae*, indicating that the matter refers to the interpretation and application of standards of private international law on the international return of minors, specifically contained in the Hague Convention. In this regard, the State alleges that based on the provisions of Article 33 of the American Convention the IACHR could not rule on the alleged failure to comply with the obligations assumed by the State within the framework of the referenced international convention, since its competence is limited solely to the power established in the American Convention to hear alleged violations of the rights established in that instrument.

21. In this regard, the Commission notes that in the matter under review there are allegations regarding violations of the rights contained in the American Convention allegedly committed with respect to a judicial proceeding brought before the Ecuadorian authorities pursuant to the Hague Convention, an instrument ratified by Ecuador and an integral part of its domestic legislation. The Commission believes that although this international instrument was the principal basis of the dispute between the parties before the domestic courts, in the current petition before the inter-American system the Commission is competent *ratione materiae* to hear the complaints related to the alleged effects on rights contained in the

⁸ The State indicates that based on this fact the boy’s father filed a complaint with the Ecuadoran authorities, on the basis of which an investigation was opened that would be in the “preliminary investigation phase” conducted by the First Office of the Prosecutor on Sexual Crimes and Family Violence of Guayas.

American Convention, specifically those indicated in the characterization section of this report (See B.4 below).

22. The foregoing is without prejudice to the ability of the IACHR, when analyzing whether the Ecuadorian State was internationally responsible under the American Convention, to take into consideration other instruments that are part of the *corpus juris* on the subject of the rights of children and adolescents. In addition, taking into account the specific characteristics of this case, the Commission will be able to take into account the specifics of the respective judicial proceeding, in the light of relevant international or domestic standards.

B. Admissibility requirements

1. Exhaustion of domestic remedies

23. Article 46.1.a) of the American Convention requires the prior exhaustion of the remedies available in the domestic jurisdiction 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 requirements 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 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.

24. It must first be made clear which domestic remedies are to be exhausted in the instant case. The Commission recalls that Article 46.1.a) of the Convention requires that only domestic remedies related to the allegations regarding violations of the Convention must be exhausted and, at the same time, these remedies must be appropriate, which means that they can provide an effective and sufficient remedy to such violations. All domestic systems have multiple remedies but not all of them are applicable to all circumstances. Accordingly, it is not necessary to exhaust those remedies that, while theoretically constituting remedies based on their nature, offer no opportunity to remedy the alleged violations.⁹

25. In this regard, the IACHR notes that on the date the petition was submitted, the petitioner alleged that there was an unwarranted delay in the judicial proceeding on the petition for return, specifically because despite the order issued by the National Court of Minors on January 16, 2003, the court did not proceed to issue the judicial order to return S. to Spain, thus ignoring the “urgent” nature of the matter and the timeframes required by the Hague Convention for processing petitions of this kind. For its part, the State alleged that there was no unwarranted delay in that possible delays occurring during the course of the process were not attributable to domestic judges but rather to the “activity of the [child’s father, possibly] that tended to delay the process.” Subsequently, the petitioner indicated that the judicial process led to the decision of August 18, 2004 issued by the Third Court for Childhood and Adolescence of Guayas ordering that S. be immediately returned to Spain. The State has not disputed this information nor has it alleged, given this decision, that there are any other remedies available that, based on their nature and efficacy, must be exhausted.

26. As has been established elsewhere, the situation that must be taken into account to establish whether the domestic remedies have been exhausted is the situation existing when deciding on admissibility, given that the moment when the complaint is submitted and the moment when a ruling is made on admissibility are different.¹⁰ Based on these considerations, the IACHR believes that the decision of the Third Court for Childhood and Adolescence of Guayas issued on August 18, 2004 is the decision that definitively resolved the proceeding on the petition for international return on behalf of S. In this sense, given the characteristics of the instant case, the Commission concludes that the referenced

⁹ I/A Court HR. *Velásquez Rodríguez Case*, Preliminary objections, judgment of June 26, 1987, paras. 63, 64, and 88.

¹⁰ IACHR, Report No. 52/00, *Dismissed Congressional Workers*, June 15, 2000, para. 21.

decision exhausted the domestic remedies, complying with the requirement established in Article 46.1.a) of the Convention.

2. Deadline for submitting the petition

27. Article 46.1.b) of the American Convention establishes that in order for a petition to be admissible 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 addition, Article 32 of the Rules of Procedure of the Commission establishes that in cases where the exceptions to prior exhaustion of domestic remedies are applicable the petition must be submitted within a reasonable period in the judgment of the Commission.

28. The petition was received on May 22, 2003 and in this case the Commission has determined that although the remedies were in progress at the time the petition was submitted the judicial process regarding the petition for international return in favor of S. was later resolved in the decision of August 18, 2004 of the Third Court for Childhood and Adolescence of Guayas. Therefore, in view of the context and characteristics of the instant case, the Commission believes that the admissibility requirement referring to the deadline for submission should be considered satisfied.

3. Duplication of international proceedings

29. The petition file contains no information that could lead to a determination that the case 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 Article 46.1.d) and Article 47.d) of the American Convention are not applicable.

4. Characterization of the alleged facts

30. Neither the American Convention nor the IACHR Rules of Procedure require the petitioner to identify the specific rights alleged to have been violated by the State in a matter submitted to the Commission, although petitioners may do so. It is up to the Commission, based on the jurisprudence of the system, to determine in its admissibility reports what provision of inter-American instruments is applicable and that its violation could be established should the alleged facts be proven through sufficient evidence.

31. At the current stage of the proceedings, it is not in order to determine whether or not the acts alleged to be violations of the American Convention took place; instead, the IACHR must only conduct a *prima facie* evaluation to determine whether the petition establishes grounds for the apparent or potential violation of a right guaranteed by the Convention. This determination constitutes a preliminary analysis that does not entail pre-judgment on the merits of the matter.¹¹

32. In the instant case, the petitioner claims that the Ecuadorian State violated the right of the alleged victims to a fair trial and judicial protection as a consequence of the alleged unwarranted delay in the processing of an international petition on behalf of child S, as well as failing to take the necessary measures to enforce subsequent court decisions, which were handed down by Ecuadorian judges, granting said petition. She contends that as a result of the actions of the Ecuadorian authorities, child S. was kept away from his mother and grandmother, who constituted his core family. In response, the State argues that the claim does not involve facts that tend to establish violations of human rights enshrined in the Convention, inasmuch as it pertains to a matter of a private nature, that was decided by domestic courts with strict adherence to the standards of due process of the law and excludes the IACHR as competent to hear the case, as it involves the application of standards of international private law.

33. With respect to this argument, the IACHR reiterates that in the instant petition, claims are brought relating to the alleged actions of the Ecuadorian State in the context of a judicial proceeding, which are alleged to have infringed rights provided for in the American Convention, as laid out in the section on characterization of the alleged facts, and which may be examined by the IACHR in keeping with applicable international standards (see *supra* IV.A on *ratione materiae* competence).

34. Given the factual and legal evidence presented by the parties and the nature of the case submitted for its hearing, the Commission finds that the petitioner's allegations could represent violations of the rights protected under Articles 5, 8, and 25 of the American Convention in connection with Article 1.1 thereof, to the detriment of Mrs. Marta Rodríguez Cicero and Mrs. María Gloria Cicero Secades, and the child S. Similarly, the Commission will examine the alleged facts in the light of Article 19 of the American Convention, specifically with regard to the special duty to protect that States have in accordance with the principle of the best interests of the child and the *corpus juris* on the subject of children and adolescents. The Commission will also consider in the merits phase the possible violation of the alleged victims' right to family life, protected under Article 17.1 of the American Convention.

35. In that these aspects of this complaint are not obviously groundless or out-of-order, the Commission considers the requirements established in Articles 47 b. and c. of the American Convention to have been satisfied.

V. CONCLUSIONS

36. The Commission concludes that it is competent to examine the complaints submitted by the petitioner regarding the alleged violation of Articles 5, 8, 17.1, 19, and 25 consistent with Article 1(1) of the American Convention, in accordance with the requirements established in Articles 46 and 47 of the same instrument.

¹¹ See: IACHR, Report No. 173/11, Petition 897-04, Alejandro Daniel Esteve and sons, Brazil, November 2, 2011, par. 43.

37. Based on the factual and legal arguments presented above,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this petition admissible with respect to Articles 5, 8, 17.1, 19, and 25 in connection with Article 1(1) of the American Convention.

2. To inform the Ecuadorian State and the petitioner of this decision.

3. To continue with analysis of the merits of the matter.

4. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Executed and signed in the City of Washington D.C, on November 8, 2012. (Signed): José de Jesús Orozco Henríquez, President (with explanation of vote); Felipe González, Second Vice President; Dinah Shelton, Rodrigo Escobar Gil, Rosa María Ortiz (with explanation of vote), and Rose-Marie Antoine, Commission Members.

**JOINT EXPLANATION OF VOTE OF COMMISSION MEMBERS JOSÉ DE JESÚS OROZCO
HENRÍQUEZ AND ROSA MARÍA ORTIZ REGARDING THE ANALYSIS OF CHARACTERIZATION SET
FORTH IN ADMISSIBILITY REPORT No. 85/12 (S. ET AL)**

In accordance with Article 19 of the Rules of Procedure of the Inter-American Commission on Human Rights and within the time period provided for under said provision, by means of this explanation of vote, I hereby put forth my opinion on the admissibility report approved at the 146th Regular Session regarding petition 381-03- S. et al involving the State of Ecuador.

As the Commission notes in its admissibility reports:

Neither the American Convention nor the Rules of Procedure of the Inter-American Commission on Human Rights requires petitioners to identify the specific rights allegedly violated by the State in matters submitted to the Commission, even though the petitioners may do so. However, it is the duty of the Commission, in following the system of legal precedent, to determine in its admissibility reports, what provision of relevant Inter-American instruments is applicable and could be concluded to have been violated, should the alleged facts be proven by means of sufficient evidence.

In my opinion, it is important for the Inter-American Commission, in exercising said prerogative, to invoke provisions of the Convention that may be relevant to the decision on the merits of the matter and, consequently, will contribute to a more comprehensive analysis of the applicable right provided for in the Convention.

Accordingly, I believe that in the analysis pertaining to the characterization of the facts alleged in the petition, specifically paragraph 15 of the admissibility report and, consequently, in the conclusion drawn in paragraph 17 and operative item number 1, the right established in Article 11 of the American Convention should have been incorporated.

Without prejudice to the examination of the merits, I believe that the prohibition set forth in said provision is not restricted to interference in private life only by agents of the State. In accordance with the duty to ensure rights, as established in Article 1.1 of the American Convention, States also assume an obligation to respond to interference in private life and family committed by private third parties. Accordingly, an alleged failure to take measures by the competent authorities in order to adequately respond to an act of a private individual, which affects another's family life, could be analyzed in light of the duty to ensure the right enshrined in Article 11 of the American Convention.

Therefore, in my opinion, analysis of the merits in the instant case could be enhanced by an examination of this provision, in conjunction with the right set forth in Article 17 of the American Convention.