

REPORT No. 8/13
PETITION 793-06
ADMISSIBILITY
OSMÍN RICARDO TOBAR RAMÍREZ, JEFFREY RAINIERY ARIAS RAMÍREZ ET AL.
GUATEMALA
March 19, 2013

I. SUMMARY

1. On August 1, 2006, the Inter-American Commission on Human Rights (hereinafter, “the Commission,” “the IACHR,” or “the Inter-American Commission”) received a petition submitted by the *Asociación Casa Alianza*, the *Movimiento Social por los Derechos de la Niñez* and the Center for Justice and International Law (CEJIL), (hereinafter, “the petitioners”), on behalf of the children Osmín Ricardo Tobar Ramírez and Jeffrey Rainieri Arias Ramírez, Mrs. Flor María Ramírez Escobar and Mr. Gustavo Amílcar Tobar Fajardo (hereinafter, “the alleged victims”). The petitioners reported that on January 9, 1997, the children Osmín Ricardo Tobar Ramírez, eight years of age, and Jeffrey Rainieri Arias Ramírez, two years of age, were removed from their home by agents of the Office of the Prosecutor General of the Nation [*Procuraduría General de la Nación*], by order of the Juvenile Court [*Juzgado de Menores*]. The foregoing came about as the result of an anonymous complaint to the Court for alleged child neglect. The petitioners alleged that the children were placed in a private institution, declared to have been abandoned, and thereafter, in June 1998, were surrendered for adoption to two families from the United States by means of a notarial procedure. They stated that all the measures taken to recover the children—administrative as well as legal [remedies] sought by the mother of the children, Mrs. Flor María Ramírez Escobar, and the father of one of the children, Mr. Gustavo Amílcar Tobar Fajardo—have been unsuccessful. The petitioners alleged that the delay and ineffectiveness in going forward with the remedies sought make the exception to the exhaustion of internal remedies applicable as referred to under Article 46(2) of the Convention. They added that this case dates from an era when there was a pattern of irregular international adoptions in Guatemala, fostered by inadequate legislation in this regard.

2. For its part, the State alleged that the anonymous complaint received was corroborated by different inquiries that confirmed the state of neglect of the children Osmín Ricardo Tobar Ramírez and Jeffrey Rainieri Arias Ramírez. The State argued that, based on this evidence, the Court decreed the children’s abandonment and their placement for adoption. With regard to the proceedings subsequent to the declaration of abandonment, specifically the appeals lodged by Mrs. Flor María Ramírez Escobar and Mr. Gustavo Amílcar Tobar Fajardo, it stated that the courts heard such appeals and handed down rulings until the case was closed on September 19, 2002, because it was impossible to proceed with letters rogatory to the United States for purposes of having the children appear in Guatemala. The State maintained that it has taken several steps aimed at achieving strict enforcement of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption and the standards regarding the rights of children and adolescents enshrined in international provisions. The State has also indicated that it does not object to the admissibility of the petition.

3. Without prejudging the merits of the complaint, after analyzing the positions of the parties and in compliance with the requirements provided for under Article 46 and 47 of the American Convention on Human Rights (hereinafter, the “American Convention”), the Commission has declared the petition to be admissible for purposes of examining a possible violation of the alleged victims’ rights that are enshrined in articles 5, 8, 17, 18, 19, 24 and 25 of the Convention, and in keeping with Article 1(1) and 2 of said Convention. The Commission has also decided to notify the parties of this decision, publish it, and include it in their Annual Report to the OAS General Assembly.

II. PROCEEDINGS BEFORE THE COMMISSION

4. On August 1, 2006, the IACHR received the petition and assigned it number 793-06. The annexes to the petition were received on September 7, 2006. On February 15, 2007, the petition was forwarded to the State, which was granted two months to submit its response, in keeping with the IACHR Rules of Procedure. On May 7, 2007, the State submitted its response and supplemented such response on June 7 of that same year. On July 13, 2007, the petitioners presented additional observations.

5. On January 14, 2008, the petitioners made a request for a public hearing at the 131st period of sessions, which was not granted. On April 3, 2008, the IACHR requested specific information from both parties. The State presented observations and information on May 1, 2008, and the petitioners provided their observations and additional information on May 15, 2008.

6. The IACHR once again requested specific information from the parties on June 17, 2008. The State presented information on May 27 and July 31, 2008, and the petitioners on September 1 of that same year.

7. The petitioners informed the IACHR on April 15, 2011 of the "initiation of discussions with the Guatemalan State in order to further a friendly settlement process." On June 30, 2011, the IACHR communicated its decision to place itself at the disposal of the parties with a view to reaching a friendly settlement on the matter and urged them to affirm their interest in initiating the procedure provided for under Article 48(1)(f) of the American Convention on Human Rights. Both parties affirmed such interest: the petitioners on August 15, 2011 and the State on November 18 of that same year.

8. During a working visit to Guatemala by the Country Rapporteur, the IACHR invited both parties to a meeting on March 10, 2012, in order to promote the friendly settlement process. At the meeting the parties agreed to sign a friendly settlement agreement in short order. On March 15, 2012, the State reported that it had sent the petitioners the draft friendly settlement agreement and affirmed that the parties had reached a consensus thereon. However, on May 9 and June 15, 2012, the petitioners informed the IACHR that it had not been possible to reach an agreement with the State, and they therefore requested that the proceedings continue. The State presented additional information on January 14, 2013. All the submissions mentioned in previous paragraphs were duly forwarded to the parties.

III. POSITION OF THE PARTIES

A. Position of the petitioner

9. The petitioners claimed that on December 18, 1996, the First Juvenile Court of the First Instance for the Department of Guatemala [*Juzgado Primero de Primera Instancia de Menores del Departamento de Guatemala*], received an anonymous complaint about the alleged neglect of the children Osmin Ricardo Tobar Ramírez, eight years of age, and Jeffrey Rainiery Arias Ramírez, two years of age. Based on this anonymous complaint, on January 8, 1997, the Court, of its own initiative, tasked the Office of the Prosecutor for Juveniles [*Procuraduría de Menores*] to corroborate the children's situation, and if the facts reported were confirmed, to proceed to rescue them. The petitioners indicated that in the execution of said task, on January 9, 1997, the Office of the Prosecutor went to the home of the children's mother, Mrs. Flor María Ramírez Escobar, and removed the children. That same day they were admitted to a private institution named "Children's Association of Guatemala".

10. The petitioners reported that the children's mother was working at that time, but that she was paying a woman to take care of her children. They indicated that this woman was the one who had anonymously reported to the Court that the children were neglected and that when the agents from the Office of the Prosecutor arrived, this woman was not at the home caring for the children as she should have been doing. They added that when the mother found out that her children had been removed she went to the Office of the Prosecutor with the corresponding birth certificates to request their return, but was turned away. Likewise, when she found out about the proceedings before the Juvenile Court that same day, January 9, 1997, Mrs. Flor María Ramírez Escobar also

went there with the respective birth certificates, requesting that her children be returned to her, but she was not informed of the children's whereabouts nor was she permitted to see them.

11. The petitioners reported that the Court initiated an investigation with regard to the alleged neglect of the children only after having removed them from their domicile and that this investigation was flawed. In this regard, they stated that a report was prepared by a social worker from the Office of the Prosecutor based solely on the anonymous statements of neighbors who indicated that the mother left the children alone because she would go to work and that she did not leave them food.

12. The petitioners pointed out that the Court did not consider other offers from the children's relatives to care for them. Among these was that of Mrs. María Escobar Carrera, the children's maternal grandmother. On March 12, 1997, Mrs. Escobar Carrera went to the Court and requested that the children be surrendered to her. The psychological and social studies conducted by the Court stated that Mrs. Escobar had an unstable economic situation, an arrest record, and that "with regard to the maternal grandmother as a family caregiver, it should be borne in mind that an adult with homosexual preferences would be transmitting these values to the children who would be under her charge."

13. Furthermore, on March 17, 1997, Mrs. Yesenia Edelmira Escobar Carrera de Bonilla, godmother of Jeffrey Rainiery Arias Ramírez, one of the children, appeared and requested that he be turned over to her to care for. The Court's report had determined that in reality she was the godmother of Osmin Ricardo Tobar Ramírez, the other child, and that Osmin Ricardo had stated that he did not want to go with her.

14. With regard to the children's mother, the Court had determined that her economic situation was precarious and the psychological report had established that her ability to assume her role as a mother was seriously compromised and that she would need medium-term psychological treatment. The petitioners alleged that the Court did not summon the children's fathers, despite the fact that they appeared as such on the respective birth registries. Additionally, with regard to the father of Ricardo Osmin Tobar Ramírez, the petitioners have shown that on July 31, 1997, the father and Mrs. Flor de María Ramírez signed a voluntary agreement for payment of child support for their son before the First Family Court of the City of Guatemala.

15. According to the petitioners, based on the quick and flawed investigation, on August 6, 1997, the First Juvenile Court of First Instance of the Department of Guatemala declared that the children, Jeffrey Rainiery Arias Ramírez and Osmin Ricardo Amílcar Tobar Ramírez, had been abandoned and granted legal custody of the children to the "Asociación los Niños de Guatemala," ordering the institution to include them in their adoption programs..

16. The petitioners held that August 25, 1997, Mrs. Flor de María Ramírez filed an appeal for review of the declaration of abandonment, asserting that there was no evidence of neglect and presenting written evidence such as medical care and certificates of education. They have further held that if there had been evidence of neglect, Mrs. Flor de María Ramírez had not been given the chance to change her way of life for the good of her children. Mrs. Ramírez also requested that her children be taken from the foster care center and [she be given] permission to visit them. The petitioners added that the appeal was dismissed on September 23, 1997, because "none of the family members of these minors qualify to be their guardians..." On September 26 of that year, Mrs. Ramírez filed an appeal for reversal, which was granted due to the failure to notify the decisions of August 25 and September 23, 1997. This decision ordered all proceedings since November 25 to be invalidated, ordered that the notifications be served, and upheld the declaration of abandonment. On October 2, Mrs. Ramírez presented a brief in which she reported that she had not been notified and requested that evidence be taken for a motion to reconsider. On October 28, 1997, Mrs. Ramírez requested that the Court rule on the situation immediately. On May 4, 1998, the Second Juvenile Court of the First Instance ruled that the declaration of abandonment and the decision to deny the appeal for review were unappealable.

17. The petitioners reported that despite the existence of pending proceedings the children's adoptions were processed by a private attorney, in representation of two families from the United States. They

have added that in both processes, the Office of the Prosecutor issued opinions objecting to the adoptions due to the pending proceedings, but that the Court nevertheless overruled both objections and upheld the adoption processes for both children.

18. The petitioners alleged that in 1998 adoptions in Guatemala could be done either in court or out of court. The out of court process, which was used in both adoptions, was governed by the Law Regulating Notarial Procedures of Legal Matters of a Voluntary Jurisdiction. These provisions required the certification of the corresponding birth certificate, the testimony of two honorable people accrediting the adoptive parents' background, the report from a social worker assigned to the family court of their jurisdiction, and the opinion of the Office of the Prosecutor General of the Nation. Only if the Office of the Prosecutor objected would the competent Court be required to issue the pertinent decision. According to the petitioners, this law granted such leeway to the attorneys and notaries that it fostered the fabrication of reports, statements and evidence to facilitate irregular international adoptions, which at that time were the highest in the world. They stated that organizations such as UNICEF had reported that in Guatemala, due to the weakness of the laws, adoptions had become lucrative business transactions for the different parties involved. The petitioners have reported that the facts of this case are consistent with this context, such that Jeffrey Rainiery Arias Ramírez and Ricardo Osmin Tobar Ramírez were deprived of their family setting by international adoption networks that operate in Guatemala and were led by a lawyer closely tied to the home "Asociación de Niños de Guatemala", who at that time was the wife of the Presiding Judge of the Supreme Court of Justice. This led to eight judges disqualifying themselves from hearing the case during the proceedings, and through influence peddling resulted in the children's irregular adoption.

19. The adoption of the child Jeffrey Rainiery Arias Ramírez began with a power of attorney granted to a private attorney in Illinois, United States, on October 24, 1997, by a family from the United States. The power of attorney was legalized by the same notary that subsequently issued the adoption decree. The notarial procedures for the adoption of the child Arias Ramírez were processed by the private attorney and once the requirements were satisfied as regards the receipt of a favorable report from the social worker and testimony of two honorable individuals, as well as the consent of the Director of the "Asociación de Niños de Guatemala," the Notary requested the opinion of the Office of the Prosecutor. The Office of the Prosecutor stated its objection to the adoption approval, which is why the Trial and Family Court of Sacatepequez was consulted. On May 26, 1998, the Court issued a decisions ordering that the corresponding adoption decree be issued. Once this had been done, a notary granted the adoption of Jeffrey Rainiery Arias Ramírez and the girl Josefa FS to the family in question and ordered the change of last name. On June 11, 1998, Jeffrey Rainiery was registered as the adoptive son of the family from the United States in the Civil Registry of Births of the Municipality of Guatemala.

20. According to the petitioners, the adoption of the child Ricardo Osmin Tobar Ramírez began with the granting of a power of attorney to a private attorney in the city of Pittsburg, United States on February 5, 1998 by a family from the United States. The power of attorney was legalized by the same notary that subsequently issued the adoption decree. The notarial procedures for the child Tobar Ramírez were processed by a private attorney and once the requirements were satisfied as regards the receipt of a favorable report from the social worker and testimony of two honorable individuals, as well as the consent of the Director of the "Asociación de Niños de Guatemala," the Notary requested the opinion of the Office of the Prosecutor. The Office of the Prosecutor stated its objection to the adoption approval, which is why the Trial and Family Court of Saquatepequez was consulted. On May 26, 1998, the Court issued a decision ordering that the corresponding adoption decree be issued. Once the foregoing had been done, a notary—the same one who had participated in the adoption of Jeffrey Rainiery Arias Ramírez—granted the adoption of Ricardo Osmin Tobar Ramírez and the child Erik AS to the family in question and ordered the change of last name. On June 11, 1998, Ricardo Osmin was registered as the adoptive son of the other family from the United States in the Civil Registry of Births of the Municipality of Guatemala.

21. The four children left for the United States in July 1998.

22. The petitioners reported that on December 17, 1998, upon discovering what was happening to his son, Mr. Gustavo Amílcar Tobar Fajardo filed an appeal for review before the Juvenile Court of First Instance of the Department of Escuintla, in which he alleged that he had not been notified of the decisions handed down in the abandonment proceedings and denounced that his son was a victim of an international network that sold children, led by an attorney closely tied to the home "Asociación de Niños de Guatemala". That very day, the Court rejected the appeal as time-barred and because Mr. Tobar was not a party to the proceedings. Mr. Tobar filed an amparo appeal against the Court's decision on February 2, 1999. Thereafter, on March 18 of that year, he submitted a brief in which he provided additional evidence such as the birth certificates of both children. The Court of Appeals issued a decision upholding the amparo appeal on May 5, 1999, and ordering that Mr. Tobar be made a party to the proceedings. The petitioners alleged that subsequently two judges disqualified themselves, and that on August 29, 2000, Mrs. Flor de María Ramírez and Mr. Gustavo Tobar sought joint legal representation and on November 6 requested that the proceedings be amended and that, *inter alia*, the children be ordered to appear in Court. On October 7, 2000, the new Court granted the appeal for review and scheduled a hearing.

23. The petitioners stated that only the father (who exercised representation for Mrs. Flor de María Ramírez) and a representative of the Office of the Prosecutor General of the Nation appeared at the hearing, convened on August 30, 2001. As a result of this hearing, the Court issued an order to send "letters rogatory to the Embassy of the United States of America so that, through the corresponding legal and administrative channels, the individuals [adoptive families of the children] be summoned to appear before this Court on November 15, 2001 at the latest, and make the minors Jeffrey Rainiery Arias Ramírez y Ricardo Osmin Tobar Ramírez available to this Judicial Body..."

24. The petitioners added that on November 29, 2001, the Ministry of Foreign Relations of Guatemala sent a letter to the Presiding Judge of the Supreme Court of Justice, stating that the Embassy of the United States had not processed the letters rogatory because it did not comply with the formalities required under the Inter-American Convention on Letters Rogatory and its Additional Protocol.

25. The petitioners reported that on December 19, 2001, the Court issued an order in which it informed the parties that these legal requirements had to be met. On June 20, 2002, the Court issued an order to initiate the procedure, and requested that Mr. Gustavo Amílcar Tobar state whether he was willing to defray the costs associated with summoning the adoptive parents. The petitioners indicated that on July 31, 2002, Mr. Tobar requested that the procedure go forward and stated that he had obtained a loan in order to finance the expenses related to the case. On August 20, 2002, the Court ordered that this procedure in the case go forward and that Mr. Tobar be summoned. The petitioners noted that Mr. Tobar was never informed what the cost would be for the translations and certifications necessary to process the letters rogatory, and that since that time, nothing has been done to either locate or summon the children. They alleged that the responsibility of the State was to continue with the legal procedures, send the letters rogatory, ensure ties with the biological parents and make a decision based on the best interest of the children. They asserted that the State also had the obligation to establish the corresponding liability in the irregular adoptions of the children Jeffrey and Ricardo.

26. The petitioners maintained that the proceedings to declare child abandonment, as well as the two out of court adoption procedures of the Ramírez brothers, in which different legal and administrative authorities were involved, violated the right to judicial guarantees, to protection of the family, and to humane treatment, recognized in Articles 5, 8, 17 and 25 of the American Convention, in detriment to Mr. Gustavo Amílcar Tobar Fajardo, Mrs. Flor de María Ramírez, and children Osmin Ricardo Tobar Ramírez and Jeffrey Rainiery Arias Ramírez. Additionally, they claimed that the facts constitute a violation of the right to special protection, enshrined in Article 19 of the American Convention, to the detriment of the children Osmin Ricardo and Jeffrey Rainiery. The foregoing is in connection with the duty to adopt provisions under domestic law and the obligation to respect rights, which is recognized in Articles 1 and 2 of the Convention.

27. In this regard, they argued that there is no justification for the proceedings to have taken so long without any resolution. They denounced that the issue was not complex, the parents' involvement was very intense, and the rights impaired required a speedy solution; nevertheless, to date, the legal authorities have not

resolved the situation. They maintained that the only procedure that was swiftly completed was the declaration of child abandonment and the subsequent adoptions of the children.

28. They alleged that the Ramírez brothers' personal well-being was affected, above all their psychological well-being, for having been arbitrarily forced by the State to be separated from their biological mother and the biological father of Osmín Ricardo Tobar Ramírez, for having been arbitrarily housed in a private institution for 17 months, and having had to live with families residing in the United States of America where the language and cultural values were different from those of their biological parents, leading to anguish, pain and suffering. They noted that said suffering has continued throughout time due to the lack of contact with their biological parents. They also argued that the well-being of Mrs. Flor de María Ramírez Escobar and Mr. Gustavo Amílcar Tobar Fajardo was affected inasmuch as they were arbitrarily deprived of their children and were unable to contact them despite the different petitions and appeals presented to the Guatemalan authorities, which has caused them intense anguish, pain and suffering.

29. The petitioners asserted that the family life of the alleged victims has been impaired by the State due to its arbitrary intervention in the family unit, its failure to ensure communication and contact amongst the alleged victims, its failure to stop the attorneys and notaries involved in going forward with the adoption procedure, which was inconsistent with international standards in the matter, and its failure to comply with the Inter-American Convention on Letters Rogatory and Its Additional Protocol.

30. They alleged that the State has not investigated and, where appropriate, prosecuted and punished the authorities responsible for the unjustified delay in the proceedings to review the declaration of child abandonment, as well as other authorities and individuals that intervened in the declaration of abandonment and the adoption of Osmín Ricardo Tobar Ramírez and Jeffrey Rainiery Arias Ramírez.

B. The State's position

31. The State alleged that the authority that issued the declaration of child abandonment considered different evidence gathered in order to rule on the appropriateness of the protection measures in favor of the Ramírez brothers. The State indicated that in its decision of August 6, 1997, which decreed the children's abandonment and granted custody to the home "Asociación de Niños de Guatemala", the Court considered the report of the Section for Minors of the Office of the Prosecutor General of the Nation, the report of the social worker, and the statements of the mother and grandmother of Osmín Ricardo Tobar Ramírez and Jeffrey Rainiery Arias Ramírez, as well as the godmother of one of them, in order to corroborate the facts of the complaint received and to determine the conduct of the mother, Ms. Flor de María Ramírez Escobar. Therefore, it considered that it had complied with the necessary formalities to issue said declaration of child abandonment.

32. The State affirmed that Mrs. Flor de María Ramírez Escobar filed an appeal for review that was dismissed by the First Juvenile Court of the Department of Guatemala on September 23, 1997.

33. The State noted that Mrs. Flor de María Ramírez Escobar and Mr. Gustavo Amílcar Tobar Fajardo presented another appeal for review that was granted on November 7, 2000, and that once the review of the declaration of child abandonment was reconsidered, the supplemental statements of Mrs. Flor de María Ramírez Escobar and Mr. Gustavo Amílcar Tobar Fajardo were accepted on November 28, 2000 and December 6, 2000, respectively. The State indicated that it also ordered the social worker and psychologist of the Court that heard the case to conduct a social and psychological development study to determine whether Mrs. Flor de María Ramírez Escobar and Mr. Gustavo Amílcar Tobar Fajardo would provide an appropriate psychological, emotional and family setting for the aforementioned minor children. The study concluded that indeed they would.

34. The State indicated that on August 31, 2001, subsequent to the hearing, the Court ordered the forwarding of letters rogatory addressed to the Embassy of the United States of America so that through the Embassy, and through legal and administrative channels, it summoned both families residing in the United States

of America so they would appear before the Court that heard the case, by November 15, 2001 at the latest, and make the Ramírez brothers available to this Court in order to have contact with their biological parents.

35. The State indicated that on July 1, 2002, the Court that heard the case notified Mr. Gustavo Amílcar Tobar Fajardo of the order to affirm whether he would be willing to pay the expenses that would be incurred in the summons to both families residing in the United States of America, and noted that the Office of the Prosecutor General of the Nation and the private institution "Asociación los Niños de Guatemala" were also notified. The State noted that Mr. Gustavo Amílcar Tobar submitted a brief on August 2, 2002, in which he stated his willingness to defray the expenses of paying official translators and similar services, reiterating that the adoptive parents of the aforementioned minors be required to come to Guatemala and appear before the Court in order to decide on the case in the most appropriate way possible. Nevertheless, the State alleged that his response was vague about the expenses that would be incurred specifically with regard to the letters rogatory summoning the children's adoptive parents.

36. The State pointed out that the Trial Judge for Childhood, Adolescence and Adolescents in Conflict with the Law of the Department of Chimaltenango, issued an order on August 20, 2002, summoning Mr. Gustavo Amílcar Tobar Fajardo to a hearing to take place on September 10, 2002, in relation to the procedure to go forward before the Ministry of Foreign Relations. This decision was notified on August 23, 2002. The State alleged that Mr. Tobar did not appear a said hearing.

37. The State alleged that the proceedings were then transferred to the Juvenile Court of First Instance of the Department of Chimaltenango, where, on September 19, 2002, the proceeding was ordered to be closed because the matter of the adoption of the children, Osmin Ricardo Tobar Ramírez and Jeffrey Rainieri Arias Ramírez, had been decided.

38. The State argued that, with regard to the petitioner's assertion that the Court should have of its own initiative proceeded with the steps that were necessary, in keeping with the Inter-American Convention on Letters Rogatory and Its Additional Protocol and Article 35 of the Judicial Branch Act, in order to carry out said procedure, this is not pertinent given that the provision cited refers to foreign legal evidence in Guatemala. As for the petitioner's assertion that Mr. Tobar was never informed about the cost of the procedure, the State has repeated that the petitioner failed to appear for the hearing ordered by the Court.

39. The State affirmed that there is no failure to comply with the obligation to adopt provisions under domestic law in keeping with the American Convention and described a series of measures adopted to implement international provisions on international adoptions and prevent trafficking of children. It also listed bills, as well as legislative and administrative measures, adopted by Guatemala.

40. Finally, the State did not present specific pleas or arguments about the admissibility requirements provided for under Article 46(1) of the American Convention. The State indicated that "It informs the Illustrious Commission [...] that it does not object to the admissibility of the petition filed. Given that the majority of initiatives and actions implemented were adopted subsequent to the facts reported by the petitioners, the State considers that it is necessary to continue gathering information that makes it possible to determine whether there was a violation of the fundamental rights of the minors and their parents. Thus, without prejudice to the position that the State may have with regard to the merits of the case, it does not object to the admissibility thereof."

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission *ratione personæ, ratione loci, ratione temporis and ratione materiæ*

41. The petitioners are empowered, in principle, by Article 44 of the American Convention to submit petitions to the Commission. The petition points to individual persons as alleged victims, with respect to whom the State of Guatemala undertook a commitment to respect and ensure the rights enshrined in the American

Convention. As regards the State, the Commission notes that Guatemala has been a State Party to the American Convention since May 25, 1978, when it deposited its ratification instrument. Therefore, the Commission is competent *ratione personae* to examine the petition. Furthermore, the Commission is competent *ratione loci* to take cognizance of the petition inasmuch as it alleges violations of rights protected in the American Convention that took place within the territory of Guatemala, a State Party to said Convention.

42. The Commission is competent *ratione temporis* inasmuch as the obligation to respect and ensure the rights protected in the American Convention were already in force for the State on the date that the facts alleged in the petition occurred. Finally, the Commission is competent *ratione materiae* because the petition reports potential violations of human rights protected under the American Convention.

B. Other requirements for the admissibility of the petition

1. Exhaustion of domestic remedies

43. Article 46(1)(a) of the American Convention provides that for a complaint submitted to the Inter-American Commission to be admissible pursuant to Article 44 of the Convention, it is necessary for domestic remedies to have been sought and exhausted in keeping with generally recognized principles of international law. This requirement has the objective of allowing domestic authorities to take cognizance of the alleged violation of a protected right and, where appropriate, have the opportunity to decide on it before it is taken up by an international body. Article 46(2) of the Convention, for its part, provides for three situations in which the rule on exhaustion of domestic remedies does not apply: (a) 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; (b) 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 (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. These situations refer not only to the existence of such remedies, but also to their appropriateness and effectiveness.

44. In this case, the State did not object to the admissibility of the petition, although it alleged that the decision to surrender the children for adoption was done in keeping with the applicable provisions and the biological parents did not duly exhaust all remedies available. The petitioners, for their part, argued that there has been an unwarranted delay in the ruling on the appeals lodge to review the declaration of abandonment of the children (as of the decision of August 6, 1997, up until November 7, 2000), and after the appeal was upheld, there has been an unwarranted delay in summoning the children and adoptive parents to appear before the Court, in order to ensure contact with the biological parents (since August 31, 2001 to date). In sum, the petitioners alleged that the children were illegally separated from their mother by State authorities, who to date have not returned them, despite all the legal remedies and administrative measures they have taken, including offering to pay the necessary procedures to send letters rogatory to the United States. The petitioner also indicated that the request made by the Court for Mr. Gustavo Amílcar Tobar Fajardo to defray the costs of the letters rogatory is inconsistent with the State's obligation to guarantee children's rights and protect its inhabitants' human rights.

45. Having analyzed the arguments of fact and of law of the two parties, the Commission notes that the domestic remedies relevant to this matter can be divided in two stages: a first stage related to the decision to authorize the adoption of the two children, with the specific characteristics of an international adoption; and a second stage, after the children's transfer to the United States, aimed at challenging the decision to give them up for adoption or alternatively, seeking some kind of relationship between the two children and their biological parents. With regard to the first stage, the Commission took into account the arguments of the petitioners in the sense that, at different moments during this stage, the children's mother was not duly notified of legal proceedings. Furthermore, the Commission does not have specific information on how the two children's representation was provided during said proceedings. In the absence of specific arguments on these points by the State, the Commission concludes that the children's mother had no effective access to domestic remedies.

46. With respect to the second phase, and according to what the State reported, in November 2000, the First Instance Judge for Childhood, Adolescence and Adolescents in Conflict with the Law of Department of Chimaltenango took cognizance of the matter. According to the State, “said Judge modified the decision duly handed down on the appeal for review lodged on August 25, 1997 by Mrs. Flor de María Ramírez Escobar. The Judge upheld the appeal as he considered that neither Mrs. Ramírez Escobar nor Mr. Gustavo Amílcar Tobar Fajardo, father of the minor Osmin Ricardo Tobar Ramírez, had been provided sufficient opportunity to show that they offered the appropriate psychological, emotional and family setting for their children and in order for them to provide a supplemental statement.” The State added that, “nevertheless, it should be recalled that the minors by that date had already been given up for adoption as of June 2, 1998.”

47. The Court ordered that a social and psychological study be conducted, which provided favorable results for the children’s biological parents. Subsequently, the Court initiated the proceedings with regard to possible letters rogatory to the Embassy of the United States, but these measures were not duly completed due to a procedure to determine whether the children’s father was going to defray the costs related to the translation and other aspects of said letters. The petitioners have held that the transfer of said procedural burden to Mr. Gustavo Amílcar Tobar Fajardo, even when he had stated his consent, shows that he did not have effective access to domestic remedies. They also have alleged that Mr. Tobar Fajardo was not notified of the subsequent proceedings regarding the issue of costs. The State, for its part, has failed to present specific arguments regarding the costs, or why, in this case, such costs should have been borne by Mr. Tobar Fajardo and not by the State itself. Likewise, it has failed to present specific arguments or information with regard to the notification of the subsequent measure. As a result, the Commission concludes that the information available indicates, *prima facie*, that Mrs. Ramírez Escobar and Mr. Tobar Fajardo did not have effective access to domestic legal remedies.

48. The IACHR recalls that invoking the exceptions to the rule of exhaustion of domestic remedies provided for in Article 46(2) of the Convention is closely tied to the determination of potential violation of certain rights enshrined therein, such as guarantees of access to justice. Nevertheless, Article 46(2), due to its nature and purpose, is a provision with autonomous content separate from the substantive provisions of the Convention. Therefore, the determination as to whether exceptions to the rule of exhaustion of domestic remedies provided for in said provision are applicable in this particular case are taken prior to and separate from an analysis of the merits of the matter, as it depends on a standard of assessment different from that used when determining violations of Articles 8 and 25 of the Convention. It should be clarified that the causes and effect that have hindered the exhaustion of domestic remedies in this case will be analyzed, as relevant, in the report that the Commission adopts on the merits of the case in order to assess whether these constitute violations of the Convention.

2. Deadline for submitting the petition

49. Article 46(b) of the American Convention provides that for a petition to be admissible to the Commission it must be submitted within a period of six months after the date when the alleged victim was notified of the final decision. In the claim under analysis, the IACHR has established the applicability of the exceptions to the exhaustion of domestic remedies in keeping with Article 46(2)(b) of the American Convention. In this regard, Article 32 of the Commission’s Rules of Procedure provides that in cases where exceptions to the prior exhaustion of domestic remedies are applicable, the petition is to be submitted within a reasonable timeframe, as determined by the Commission. For such a purpose, the Commission is to consider the date when the alleged violation of rights occurred and the circumstances of each case.

50. In this case, the petition was received on August 1, 2006. Taking into account the applicability of the exception provided for under Article 46(2)(b) regarding the obstacles in accessing domestic remedies, the fact that the State has not offered arguments with regard to this point and that Mrs. Ramírez Escobar and Mr. Tobar Fajardo have not been able to effect a change in the situation reported—one that has consequences that continue over time—the Commission considers that the petition was submitted in a reasonable timeframe and the requirement for admissibility regarding the deadline for submission has been met.

3. Duplication of international proceedings and *res judicata*

51. From the case file there is nothing to indicate that the subject of the petition is pending before any other international settlement proceeding or that it reproduces a petition already examined by this or any other international body. Therefore, the requirements established in 46(1)(c) and 47(d) of the Convention are deemed to have been met.

4. Characterization of the facts alleged

52. The Commission considers that it is not fitting at this stage of the proceedings to decide whether the alleged violations occurred to the detriment of the alleged victims. For purposes of admissibility, the IACHR is at this point to decide solely whether the facts described, if proven, would characterize violations of the American Convention, as stipulated in Article 47(b) thereof, and whether the petition is “manifestly groundless” or “is obviously out of order,” in accordance with subparagraph (c) of the same Article.

53. The criteria for weighing these circumstances are different from those required in order to rule on the merits of a complaint. The IACHR is to undertake a *prima facie* assessment and determine whether the complaint establishes an apparent or potential violation of a right guaranteed by the American Convention, but is not to establish the existence of said violation.¹ At this stage it is incumbent to conduct a summary analysis that does not prejudice or promote an opinion on the merits. The Inter-American Commission’s Rules of Procedure, having established one stage for admissibility and another for merits, reflect this distinction between the evaluation that the Inter-American Commission is to make in order to declare a petition admissible and that required to establish whether a violation imputable to the State has been committed.²

54. Furthermore, neither the American Convention nor the IACHR’s Rules of Procedure demand that the petitioner identify the specific rights that they allege were violated by the State in the matter submitted to the Commission, although they may do so. It is incumbent on the Commission, based on the system’s jurisprudence, to determine in its admissibility reports what provisions of the relevant Inter-American instruments are applicable and the violation of which may be established were the facts alleged proven through sufficient evidence.

55. In this sense, the IACHR considers that the facts alleged would characterize a potential violation of the rights enshrined in Articles 5, 8, 17, 18, 24 and 25 of the American Convention with respect to Mr. Gustavo Tobar, Mrs. Flor de María Ramírez, and Ricardo Osmín Tobar Ramírez and Jeffrey Rainiery Arias Ramírez, as well as Article 19 of the Convention with respect to Ricardo Osmín Tobar Ramírez y Jeffrey Rainiery Arias Ramírez, all in relation to Articles 1(1) and 2 of said Convention.

V. CONCLUSIONS

56. The Inter-American Commission has concluded that is competent to hear the merits of this case and that the petition is admissible in keeping with Articles 46 and 47 of the American Convention and has decided to continue with the analysis of the merits regarding the supposed violation of rights enshrined in Articles 5, 8, 17, 18, 24 and 25 of the Convention with respect to Mr. Gustavo Tobar, Mrs. Flor de María Ramírez and Ricardo Osmín Tobar Ramírez and Jeffrey Rainiery Arias Ramírez, as well as Article 19 of the Convention with respect to Ricardo Osmín Tobar Ramírez and Jeffrey Rainiery Arias Ramírez, all in relation to Articles 1(1) and 2 of said Convention.

¹ See IACHR, Report No. 128/01, Case 12.367, *Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser of the Daily Newspaper “La Nación”* (Costa Rica), December 3, 2001, paragraph 50; Report No. 4/04, Petition 12.324, *Rubén Luis Godoy* (Argentina), February 24, 2004, paragraph 43; Report No. 32/07, Petition 429-05, *Juan Patricio Marileo Saravia et al.* (Chile), April 23, 2007, paragraph 54.

² See IACHR, Report No. 31/03, Case 12.195, *Mario Alberto Jara Oñate et al.* (Chile), March 7, 2003, paragraph 41; Report No. 4/04, Petition 12.324, *Rubén Luis Godoy* (Argentina), February 24, 2004, paragraph 43; Petition 429-05, *Juan Patricio Marileo Saravia et al.* (Chile) April 23, 2007, paragraph 54; Petition 581-05, *Víctor Manuel Ancalaf LLaupe* (Chile), May 2, 2007, paragraph 46.

57. Based on the arguments of fact and of law provided for above,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this petition admissible inasmuch as it refers to alleged violations of rights recognized in Articles 5, 8, 17, 18, 24 and 25 of the American Convention with respect to Mr. Gustavo Tobar, Mrs. Flor de María Ramírez and Ricardo Osmín Tobar Ramírez and Jeffrey Rainiery Arias Ramírez, as well as Article 19 of the Convention with respect to Ricardo Osmín Tobar Ramírez and Jeffrey Rainiery Arias Ramírez, all in relation to Articles 1(1) and 2 of said Convention.

2. Notify the parties of this decision.

3. 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 19th day of March 2013. (Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Rosa María Ortiz, Second Vice-President, Felipe González, Dinah Shelton, Rodrigo Escobar Gil, and Rose-Marie Belle Antoine, Commissioners.