

REPORT No. 88/13
PETITION 404-00
ADMISSIBILITY
MARCELO FABIÁN NIEVAS AND FAMILY
ARGENTINA
November 4, 2013

I. SUMMARY

1. On July 21, 2000, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition lodged by Hugo Adolfo Prieto (hereinafter “the petitioner”), representing Julio Roberto Nievas and Rosalía González de Nievas (hereinafter “the alleged victim’s parents”), alleging the responsibility of the Republic of Argentina (hereinafter “Argentina” or “the State”) for its failure to conduct an effective investigation for the prosecution and punishment of those responsible for the gunshot injuries and death of Marcelo Fabián Nievas (hereinafter “the alleged victim”), who died in 1981 at the Alejandro Posadas National Hospital (hereinafter “the hospital”) in the province of Buenos Aires, at the age of 17, due to alleged shortcomings in his medical treatment; for the inadequate redress given to his parents as a result of those violations; and for the failure to execute a judicial ruling ordering one of the physicians involved in his treatment to pay damages.

2. The petitioner contends that the State is responsible for violating the rights contained in Articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), 10 (right to compensation), 24 (equality before the law), and 25 (judicial protection) of the American Convention on Human Rights (hereinafter “the American Convention”), in conjunction with the obligation of respecting and guaranteeing those rights set forth in Article 1.1 thereof. Regarding compliance with the admissibility requirements, the petitioner claims that all the available remedies were exhausted and that the petition was filed within the deadline set by Article 46 of the American Convention.

3. In turn, the State argues that the petition is inadmissible since it is untimely with respect to the criminal proceedings, the petitioner incorrectly exhausted the domestic remedies related to the civil liability of the public hospital, and the facts alleged and examined by the civil venues do not tend to establish a violation of the American Convention.

4. After examining the parties’ positions in light of the admissibility requirements set out in Articles 46 and 47 of the American Convention, the Commission concludes that it is competent to hear the claim regarding the criminal investigation into the injuries inflicted on the alleged victim and that the claim is admissible as regards the alleged violation of the rights protected by Articles 5, 8, and 25 of the American Convention, in conjunction with Article 1.1 thereof, with respect to the alleged victim’s family. At the merits stage, it will also analyze the possible invocation of Articles VII of the American Declaration of the Rights and Duties of Man (hereinafter “the American Declaration”) and of Article 19 of the American Convention, in connection with the alleged failure of the authorities responsible for the rights of children and adolescents to intervene in the case.

5. It further concludes that the claims regarding the criminal and civil proceedings for the allegedly deficient medical treatment that contributed to the alleged victim’s death, in connection with

notify the parties of this report, to order its publication, and to include it in its Annual Report to the OAS General Assembly.

II. PROCEEDINGS BEFORE THE COMMISSION

6. The petition was received by the IACHR on July 21, 2000, and was assigned No. P-404-00;¹ it was forwarded to the State on June 25, 2004, with a deadline of two months in which to return its comments. The State submitted its reply on June 14, 2005, which was forwarded to the petitioner. The petitioner submitted comments on April 21, 2006, which were forwarded to the State.

7. On January 10, 2007, the State requested an extension of the deadline for returning its comments, which was duly granted. The State submitted its comments on April 2, 2007, and they were forwarded to the petitioner. The petitioner replied on June 25, 2009, and his reply was forwarded to the State. On November 4, 2009, the State requested that the IACHR either rule the petition inadmissible or send it to the archive.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

8. The petitioner states that on November 22, 1981, a police officer found Marcelo Fabián Nieves, aged 17, with a bullet wound to his groin, at the entrance to the home of Teresa Balbina Montserrat, who was 15 years older than him and with whom he was in a relationship. The alleged victim was taken to a public hospital by the Deputy Inspector of Police Station No. 1 in Caseros and two other officers. However, according to the claim, they did not notify either the duty court or the juvenile judge.

9. The petitioner claims that the police officers took a series of steps to cover up the attack and hinder the investigation. He contends that officers from Police Station No. 1 in Caseros reported the incident three days later, and that the written criminal complaint filed by the alleged victim's family was destroyed by one of the officers, on the pretext that it was poorly written. He states that in connection with this incident, only one police officer was prosecuted for noncompliance with official duties.

10. He reports that the alleged victim was walking when he entered the hospital, as indicated by the doctor who received him. He claims that the hospital administration did not record the alleged victim in the admissions book; that on the same day, his family tried to get him transferred to a private health facility, but they were unable to do so because the hospital administration prevented them, arguing that the alleged victim was a complainant in the criminal proceedings for his injuries. He states that on November 22, 1981, the hospital performed an exploratory laparotomy (opening the abdomen) without his family's consent, without removing the bullet, without performing clinical tests, and without first treating him with antibiotics as advised by medical science in cases involving gunshot wounds. He claims that when the police, in the company of a physician, visited the hospital on November 26, 1981, the administration told them they had no patient by the name of Nieves.

11. The petitioner states that while the alleged victim was interned in the hospital, the medical personnel made him walk along the corridors with two surgical drains attached, to the laughter of doctors and nurses. He claims that prior to his death, the alleged victim was visited by the police on three occasions and, as they were leaving, he told them that he feared for his life. He states that after the laparotomy the alleged victim was constantly complaining and vomiting, but the hospital staff paid no attention to him,² and that he was released on November 27, 1981. He contends that the medical staff did not administer antibiotics until November 28, 1981, the date of the alleged victim's death in the hospital, due to a massive infection caused by a lack of antibiotics (pulmonary embolism).

12. The petitioner claims that the State is responsible for the alleged victim's death through the medical negligence of the staff of its public hospital, and for inflicting cruel, inhuman, and degrading treatment at that facility.

13. The alleged victim's parents lodged a criminal complaint for his death at the hospital. On October 9, 1985, the provisional dismissal of the proceedings was ordered and, on October 31, 1986, statutory limitations were ruled active with respect to the criminal action against the hospital's medical personnel other than Dr. Horacio Whittingslow. In that judgment, the First Federal Judge of Morón said that "in this case, only the enquiries effectively carried out prior to the activation of statutory limitations may be considered procedural actions in the terms of Article 67 [...] of the C.P." He also said that "on November 10, 1983, Whittingslow gave a statement to the investigation, and that undertaking in the proceedings must be considered a procedural action." However, the judgment established that the action brought against the surgeon should be dismissed partially and definitively since there was no "ideal evidence to indicate an uninterrupted causal relationship between the surgery and the fatality."

14. The appeal lodged against that decision by the alleged victim's parents was settled by the Appeals Chamber on November 27, 1990, by allowing the continuation of the proceedings solely with respect to Dr. Horacio Whittingslow, who had operated on the alleged victim. Statutory limitations of criminal action did not apply to the investigation brought against the surgeon, in that the period of three years equal to the maximum applicable sentence had not passed between the warrant for his arrest of August 19, 1986, and the preventive custody order of April 21, 1989. Consequently, in the criminal action against him, statutory limitations had not been triggered.

15. On September 16, 1992, the surgeon was convicted of the crime of culpable homicide, and sentenced to a six-month conditional prison term, a special disqualification from exercising medicine for five years, plus costs.

16. The petitioner claims there were a number of irregularities in the investigation and criminal prosecution of the medical personnel for the crime of culpable homicide, most notably (i) the unwarranted delay of more than ten years that it took the First Federal Court of Morón to convict the surgeon, and (ii) the acquittal of the other defendants after statutory limitations were triggered as a result of the unwarranted delay on the part of the authorities. The first-instance judge in the criminal proceedings acknowledged in his judgment that:

² In addition, in 1996 a nurse from the Alejandro Posadas National Hospital published a book claiming that, contrary to the claims made by the hospital administration and medical staff during the criminal investigation brought for culpable

Regrettably, the carelessness and, in some instances, incompetence of the judges and judicial officers responsible for the committal phase of this case prevented physicians who were gravely implicated in Marcelo's death from being brought to trial. They benefited from the activation of statutory limitations.

17. In 1994, the alleged victim's father filed a civil suit for damages against Dr. Horacio Whittingslow and the hospital staff, which was processed by the 73rd First-instance Civil Court of Buenos Aires. On March 3, 1998, the judge ordered both the surgeon and the hospital to pay 276,800.00 Argentine pesos, plus interest and costs. The petitioner states that on April 29, 1999, Chamber I of the National Civil Appeals Court (hereinafter "Chamber I of the CNAC") partially overturned that judgment, finding that statutory limitations had been triggered with respect to the hospital, since the effects of the suspension of the statutory limitations pursuant to Articles 3981 and 3982-bis³ of the Civil Code were only applicable to the surgeon, and not to the hospital. He concluded that "if the plaintiffs wished to keep the action against the Posadas Hospital alive, they could have filed suit against it, without prejudice to the suspension of the civil proceedings established in Art. 1101 of the aforesaid code,"⁴ and that "if the result is unjust, that can only be attributed to omissions or negligence on the part of the interested party."

18. The alleged victim's father filed a special remedy for nonenforceability of law with Chamber K of the National Civil Appeals Court (hereinafter "Chamber K of the CNAC"), contending that Chamber I of the CNAC had issued a judgment that was contrary to the precedent set by Chamber D of the National Civil Appeals Court whereby the effects of a suspension of statutory limitations also applied to persons other than the defendant.

19. In addition, he holds that "civil action could not be brought against the Posadas Hospital until a decision had been reached on the responsibility or guilt of the professionals it employed." He points to the existence of precedents adopted by the Buenos Aires Provincial Supreme Court concluding that:

Proof of the doctor's guilt is essential, not because his responsibility is reflected on the institution to which he belongs, as an indirect responsibility, but because the proof of that guilt demonstrates the violation of the duty of security, which is included as a tacit obligation in the contract for treatment, and the omission of which triggers the direct responsibility of the contracting entity, in addition to that due directly and personally to the professional.⁵

20. He holds that the judgment of April 29, 1999, violated the right to equality before the law contained in Article 24 of the American Convention, since a "radically different" ruling was handed down in an earlier analogous case. He states that if the ruling issued had been in line with the criterion

³ Art. 3982-bis. If the victim of an illicit act has filed a criminal complaint against the perpetrators thereof, its filing suspends statutory limitations for the civil action, even though redress for the harm caused is not sought through the criminal courts. That suspension ceases upon the conclusion of the criminal proceedings or the desistance of the complaint.

⁴ Art. 1101. If the criminal action predates the civil action, or if it is brought while the latter is still pending, there shall be no conviction in the civil proceedings until a conviction has been issued against the accused in the criminal trial.

⁵ He holds that pursuant to the case of *Bellman, Gerardo Diego v. Lomas de Zamora Medical Association, for Damages*, resolved by the Buenos Aires Provincial Supreme Court of Justice in 1992, the civil liability of the medical institution for failing to ensure security in accordance with the contract for treatment depends on proving the offense committed by the person

upheld in 1989 in the case of *Naranjo Pariani Marta E. v. Prepat Jaime et al., for Damages*, the public hospital could have been ordered to pay damages without triggering statutory limitations in the civil action against the corporate entity. He holds that the civilian courts applied legal criteria unequally in analogous cases that both involved the suspension of statutory limitations in civil actions for the collection of damages.

21. The special nonenforceability remedy was ruled inadmissible by Chamber K of the CNAC on October 26, 1999. The alleged victim's parents learned of that decision on February 2, 2000.⁶ The petitioner adds that they were unable to "bring action against the Posadas Hospital because it was a corporate entity not subject to criminal responsibility pursuant to Article 43 of the Civil Code, as duly established by the trial judge."

22. Regarding the execution of the judgment handed down against the surgeon in the civil proceedings, the petitioner indicates that it would only have been possible to garnish a portion of his salary equal to US\$50.00 per month, since the surgeon owned no property. He contends that up to April 2006, the alleged victim's parents had only received 5,243.33 pesos,⁷ a figure that was "laughable in light of the final conviction issued in the civil proceedings and the harm actually suffered." In light of this, he asserts a failure to effectively enforce that judgment and the provision of inadequate redress for the violations inflicted.

23. In addition, the alleged victim's parents filed a criminal complaint for the gunshot wound that led to his hospitalization, together with an alleged robbery. The case was heard by the Fifth First-instance Criminal and Correctional Court of Buenos Aires which, on May 11, 1993, found that it was not possible to identify the perpetrator or perpetrators of the crime. An appeal was lodged against that decision, and the Criminal and Correctional Appeals Chamber of San Martín upheld the provisional dismissal on October 15, 1993.

24. Regarding the criminal investigation into the gunshot injuries suffered by the alleged victim, the petitioner claims that it was not effective and was marred by a series of irregularities: (i) the unwarranted delay in the proceedings due to the authorities' failure to pursue the investigation on account of the judge's several recusals and releases; (ii) the failure to consider that the alleged victim's clothing was not perforated, and so the gunshot wound must have been inflicted while he was naked; (iii) the failure to force the alleged victim's priest to give a statement regarding the content of his confession, after he refused to do so because of the seal of the confessional; (iv) the failure to take into account the fact that the priest in question was beaten and threatened by persons unidentified, in his room at the San Ramón Nonato Institute; (v) the trial judge's subjective interpretation of a statement given by a police officer that was consistent with the alleged victim's claim that the woman with whom he was in a relationship had sought to have him killed; (vi) the inadequate appraisal of the cassettes containing the confession of a prison inmate admitting his involvement in the attack during which the

⁶ Chamber K of the CNAC argued that for the remedy to prosper, the precedents cited as being contradictory should "have been issued by the Chambers of the Court in their current composition"; that was not so in the case at hand, however, since the "doctrine cited as contradictory came from Chamber D, the composition of which has mostly changed since the date of the ruling, since two of the members at the time it was handed down no longer belong to the Court."

⁷ The petitioner notes that this figure is equal to US\$1,692.04 at an exchange rate of 3.10 Argentine pesos to the U.S.

alleged victim was shot; and (v) difficulties in securing access to the case file, to the extreme that they had to appear before a Federal Court with a notary public before they could see it.

25. The petitioner claims that he lodged the petition within the period of six months established by the American Convention, in that "the domestic remedies were not exhausted with the conclusion of the criminal proceedings, since the civil case necessarily had to be processed and concluded in order to secure redress for the damages caused by the human rights violations that occurred during the criminal trial and so, clearly, all the proceedings must be analyzed jointly, as a single unit," with the deadline running as of the conclusion of the civil proceedings.

B. Position of the State

26. The State contends that on September 16, 1992, the First Federal Court of Morón convicted Dr. Horacio Whittingslow for the culpable homicide of the alleged victim and sentenced him to a six-month conditional prison term, a special disqualification from exercising medicine for five years, plus costs, and that the judgment was upheld by the Appeals Chamber on December 16, 1993. It notes that a special remedy lodged by the surgeon in question was rejected by the Supreme Court of Justice of the Nation (hereinafter "CSJN") on July 28, 1994. It claims that the alleged victim's parents stated they were notified of that decision on September 14, 1994. The State holds that the criminal trial was favorable to the alleged victim's parents in that it convicted the surgeon of the culpable homicide of their son.

27. In connection with the criminal proceedings for the serious gunshot injuries suffered by the alleged victim and the alleged qualified robbery, the State indicated that it took various steps in the investigation but was unable to identify the shooter or shooters; thus, on October 15, 1993, the case was provisionally dismissed under a resolution of the Provincial Criminal and Correctional Appeals Chamber in San Martín.

28. The State claims that in the damages suit brought by the alleged victim's parents against Horacio Whittingslow, the hospital, and three other persons, the civil judge ordered the hospital and the surgeon to pay the amount of 276,000.00 Argentine pesos on March 3, 1998.⁸ It contends that to challenge that judgment, one of the defendants and the hospital invoked an objection on the grounds of statutory limitations as provided for in Article 4037 of the Civil Code.⁹ It states that on April 29, 1999, this judgment was partially overturned by Chamber I of the CNAC, with an order for the payment, by the surgeon alone, of 196,000.00 Argentine pesos, on the grounds that statutory limitations had been triggered in the civil case brought against the hospital. It notes that on October 26, 1999, Chamber K of the CNAC dismissed the remedy for the nonenforceability of law that the alleged victim's parents had filed against that decision. It further notes that on March 8, 2000, the alleged victim's father requested that an embargo be placed on the surgeon's assets, and that his earnings were duly garnished on September 3, 2001.

29. The State indicates that between 2000 and 2001, the alleged victim's parents filed several motions for the execution of judgment in order to secure collection of the compensation stipulated therein, which were resolved in their favor. It holds that his parents received civil

⁸ The State notes that the alleged victim's father withdrew the civil action with respect to other defendants.

compensation with the surgeon's conviction and that they regularly received garnished funds from the income he earned at "two institutions where he is an employee."

30. Argentina claims that to determine a violation of Article 24 of the American Convention would require establishing, at the very least, that the civil court ruled in a radically different way in a previous judgment involving a legal situation with almost identical elements, but that this is not so in the case at hand since the petitioner failed to identify the similarities between the two cases. Argentina contends that the petitioner's intent is for the Commission to act as a judicial "fourth instance," in that he is in disagreement with the interpretation given by one of the CNAC's chambers with respect to the rules governing the triggering of statutory limitations in civil matters.

31. In addition, the State contends that the petitioner did not argue "any *de facto* or *de jure* obstacle that would have prevented the tardy suit for damages brought against the Posadas Hospital from having been presented on time, which means that the remedies available domestically for obtaining fair compensation for the death of Marcelo Nievas were not exhausted in a duly correct fashion." It holds that the petition is inadmissible, in that the facts do not tend to establish violations of the American Convention.

32. The State maintains that the six-month deadline set in Article 46.1.b of the American Convention cannot be calculated, with respect to the criminal proceedings, from the date of notification of the final decision issued in the civil case, since in Argentina, criminal and civil proceedings are juridically independent processes, with different kinds of liabilities, and with separate time frames and requirements; thus, it holds that the petition is inadmissible with respect to the claims related to the criminal proceedings on the grounds of untimeliness, given that the alleged victim's parents were notified of the final judgment on September 14, 1994.

IV. ANALYSIS OF ADMISSIBILITY

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

33. The petitioner is entitled to lodge petitions with the Commission under the terms of Article 44 of the American Convention and Article 23 of its Rules of Procedure. The petition names, as its alleged victims, individuals with respect to whom the State has assumed the commitment of respecting and ensuring the rights enshrined in the American Declaration and the American Convention. With reference to the State, the Commission notes that Argentina has been a state party to the American Convention since September 5, 1984, when it deposited its instrument of ratification. In addition, the State is obliged to respect the provisions of the American Declaration and the IACHR is competent to hear petitions alleging violations by the State of rights contained therein, in that it ratified the OAS Charter on January 19, 1956, and has been subject to the Commission's jurisdiction since 1959. The Commission therefore has competence *ratione personae* to examine the petition.

34. The Commission is competent *ratione loci* to examine the petition, since it contains allegations of violations of rights protected by the American Declaration and the American Convention that took place within the territory of a state party thereto. In addition, the Commission has competence *ratione materiae* since the petition describes violations of human rights that are protected

35. Regarding its competence *ratione temporis*, the Commission notes that the alleged violations of the alleged victim's rights in connection with his death occurred before Argentina's ratification of the American Convention on September 5, 1984. Consequently, the American Declaration represents the applicable source of law.¹⁰ Nevertheless, the IACHR points out that with respect to incidents occurring after September 5, 1984, or those that could be considered ongoing violations of rights still taking place after that date, the Commission also has competence *ratione temporis* to examine the petition in light of the American Convention.

B. Other requirements for admissibility

1. Exhaustion of domestic remedies

36. For a petition alleging violations of the American Convention to be admissible, it must meet the requirements set forth in Article 46.1 thereof and in Article 31 of the Commission's Rules of Procedure. Article 46.1.a of the American Convention states that for a petition or communication presented to the IACHR to be admissible under Articles 44 or 45 thereof and Article 31.1 of the Rules of Procedure, the remedies offered by domestic jurisdiction must have been pursued and exhausted according to generally recognized principles of international law. In turn, Article 46.2 of the American Convention and Article 31.2 of the Rules of Procedure stipulate that the prior exhaustion of domestic remedies shall not apply when: (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.

37. Regarding the exhaustion of domestic remedies, the Commission notes that the alleged victim's parents began criminal proceedings to report his death at a public hospital. They also filed a civil suit seeking the payment of damages from Horacio Whittingslow, the surgeon who attended the victim, and from the hospital where their son was operated on. In addition, they appeared before the criminal justice system to report the gunshot wound that caused the alleged victim the injuries for which he was hospitalized.

Exhaustion of domestic remedies in the criminal action

38. The Commission notes that allegations of medical negligence, at the time of the facts, could be investigated by the Argentine criminal justice system, as constituting the crime of culpable homicide, which is a publicly actionable offense. Consequently, the Commission finds that to determine compliance with the exhaustion of domestic remedies requirement, criminal action is, *prima facie*, the appropriate remedy for casting light on the violations alleged in the petition.¹¹ Similarly, the Commission notes that for the allegations involving the alleged victim's gunshot wounds, criminal venues also represent the appropriate remedy.¹²

¹⁰ See: 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. 35-45.

¹¹ See: IACHR, Report No. 69/02, Petition 419-01, Laura Albán Cornejo, Ecuador, October 23, 2002, paras. 31 and 32.

39. First, the Commission notes that after the alleged victim's death, his parents filed a criminal complaint against certain members of the hospital staff. An appeal was lodged against the judgment of October 31, 1986, which ruled that statutory limitations applied to the criminal action brought against the hospital's medical personnel other than the attending surgeon, but the appeal court confirmed that the proceedings could only continue with respect to the surgeon. The alleged victim's parents filed a special federal remedy against that judgment, which was dismissed in March 1991.

40. On September 16, 1992, the surgeon was convicted of culpable homicide and, on appeal, that ruling was upheld by the Appeals Chamber. The surgeon challenged the appeal judgment by means of a special federal remedy, which the CSJN rejected on July 28, 1994. Consequently, the Commission believes that as regards this aspect of the petition, the domestic remedies were exhausted with the CSJN's judgment of July 28, 1994, of which the alleged victim's parents were notified on September 14, 1994.

41. Second, the Commission notes that the alleged victim's parents filed a criminal complaint for the shooting and alleged robbery suffered by their son. On October 9, 1985, the provisional dismissal of those proceedings was ordered, but they were subsequently reopened, on March 4, 1993, at the request of the prosecutor after the alleged victim's father had presented fresh evidence. On May 11, 1993, the Criminal and Correctional Court concluded that it was not possible to identify the perpetrator or perpetrators of the crime. An appeal was filed against that decision but, in October 1993, the Criminal and Correctional Appeals Chamber upheld the provisional dismissal.

42. Regarding this point, the Commission reiterates its comments about provisional dismissal in Argentina: in most of the hemisphere's legal systems, the provisional dismissal of a criminal trial is not a final decision, specifically because it does not constitute a final ruling and because domestic appeals are still admissible.¹³ Since in the instant case the dismissal was not final and there is no information in the record about any formalities after May 1993, the Commission finds *prima facie* that those circumstances represent an unwarranted delay in the investigation; hence, the exceptions to the exhaustion of domestic remedies requirement set forth in Article 46.2.c of the American Convention are applicable to this aspect of the petition.

43. It must be noted that by its very nature and purpose, Article 46.2 is a provision with autonomous content vis-à-vis the Convention's substantive precepts. So, the decision as to whether the exceptions to the exhaustion of domestic remedies rule are applicable in the case at hand must be taken before the merits of the case are examined and in isolation from that examination, since it depends on a different criterion from the one used to determine whether the American Convention was indeed violated.¹⁴ This also applies to Article 31.2 of the Commission's Rules of Procedure.

¹³ IACHR, Report No. 72/03, Petition 12.159, Gabriel Egisto Santillán, Argentina, October 22, 2003, paras. 30, 51, and 58.

Exhaustion of domestic remedies in the civil action

44. Regarding the civil case brought against the surgeon and the hospital for damages, the Commission notes that the alleged victim's parents filed a civil suit in 1994. This action concluded with the judgment of March 3 1998, holding both the surgeon and the hospital civilly liable and ordering them to pay compensation. The hospital and the surgeon appealed against that judgment and, as a result, on April 24, 1999, damages were ordered from the surgeon alone, with the action dismissed under statutory limitations as regards the hospital.

45. The alleged victim's father filed a special remedy for nonenforceability of law, which was ruled inadmissible on October 26, 1999. Consequently, the IACHR finds that the alleged victim's parents exhausted the available domestic remedies as regards the alleged civil liability of the surgeon and the hospital by means of that judgment, of which they were notified on February 2, 2000. In addition, the Commission notes that following the alleged failure to effectively execute that judgment, the alleged victim's parents filed several remedies to secure its execution between 2000 and 2001; these were resolved in their favor and, therefore, they exhausted the domestic remedies available to them.

2. Timeliness of the petition

46. Article 46.1.b of the American Convention requires that for a petition to be admitted by the Commission, it must be lodged within a period of six months from the date on which the alleged victim of a rights violation was notified of the final judgment. In the matter at hand, the IACHR has already established the admissibility of one of the exceptions to the exhaustion of domestic remedies rule in accordance with 46.2.c of the American Convention and Article 31.2.c of the Commission's Rules of Procedure. In this regard, Article 32.2 of the Commission's Rules of Procedure states that in cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, petitions must be presented within what the Commission considers a reasonable period of time. For that purpose, the Commission is to consider the date on which the alleged violation of rights occurred and the circumstances of each case.

47. Regarding the timeliness of the petition, the petitioner contends that he was required to pursue and conclude the civil proceedings in order to secure redress for the human rights violations committed during the criminal proceedings; accordingly, he holds that the criminal and civil trials must be analyzed jointly, as a single unit, and that the deadline must run from the conclusion of the civil proceedings. In contrast, the State claims that the criminal proceedings and the civil proceedings were juridically independent processes, with different kinds of liabilities, and with separate time frames and requirements; thus, it holds the petition is "inadmissible with respect to the claims related to the criminal proceedings" on the grounds of untimeliness.

48. Regarding this point, the Commission notes that, unlike other states in the region,¹⁵ civil action and criminal action are independent in Argentina,¹⁶ and so it is possible to initiate a claim for civil liability without requiring the civil action to depend on the existence of prior criminal responsibilities.

¹⁵ "The Commission also understands that in the context of Ecuadorian domestic law [criminal] proceedings were a requirement to pursue civil remedies." IACHR, Report No. 89/09, TGGL, Ecuador, August 7, 2009, para. 29; see also: Report No. 24/07, Segundo Rafael Cartagena Rivadeneira, Ecuador, March 9, 2007, para. 32.

¹⁶ Civil Code, Article 1024. Damages for damages caused by crime may only be pursued through a civil action independent of

49. In this petition, the Commission clearly notes the independence between the two proceedings and that the statutory limitations on the civil action could have been suspended had a civil suit been filed against the hospital before they were triggered, independently of the criminal action brought against the attending surgeon. Regardless of this, it must be noted that the civil liability of a hospital cannot depend on a criminal trial, since it is a corporate entity that can not be pursued through criminal venues. In addition, the Commission notes that the damages for the alleged human rights violations that purportedly occurred during the criminal proceedings were not addressed in the civil case brought against the surgeon and the hospital, as the petitioner contends.

50. Accordingly, the IACHR will analyze the criminal proceedings and the civil action separately as regards the timeliness of the petition.

51. Regarding the alleged failure to conduct an effective investigation and the alleged shortcomings in due process in the criminal case brought for the gunshot wounds suffered by the alleged victim, the Commission notes that the decision to provisionally dismiss the proceedings was issued on October 15, 1993; at the time of the facts, the legislation in force did not allow the alleged victim's next-of-kin to appear as a party at trial; the provisional dismissal does not constitute a final judgment; and the alleged victim's family continued with their efforts aimed at exhausting other domestic remedies. Consequently, the Commission believes that this aspect of the petition was lodged within a reasonable time, and so it can be ruled admissible as regards those claims.¹⁷

52. Regarding the contentions related to the State's purported violation of the alleged victim's right to humane treatment and right to life, in which the remedies were exhausted through the criminal prosecution of the surgeon for culpable homicide, the Commission notes that the petition was filed on July 21, 2000, and that notice of the judgment of July 28, 1994, which ruled the special federal remedy inadmissible, was given on September 14, 1994; consequently, as regards this aspect of the petition, the aforesaid requirement was not met.

53. Regarding the alleged violations in the civil proceedings for damages brought against the surgeon and the hospital, the Commission notes that the petitioner submitted the petition on July 21, 2000, and that the alleged victim's parents learned of the judgment issued by Chamber I of the CNAC on February 2, 2000. In addition, regarding the alleged lack of effective execution of this judgment, the Commission notes that between 2000 and 2001, the alleged victim's parents also filed several motions for execution of judgment, and that those remedies were actually filed after the date on which the petition was lodged. Consequently, the Commission finds that the petition meets the requirements governing the timeliness of the petition as regards the civil proceedings and as regards compliance with its terms.

3. Duplication and international *res judicata*

54. The record of the petition does not contain any information that tends to establish that the subject of the petition is pending in another international proceeding for settlement, or that it has been previously decided by the Commission. Therefore, the IACHR concludes that the exceptions

provided for by Articles 46.1.d and 47.d of the American Convention and by Article 33 of the Commission's Rules of Procedure are not applicable.

4. Colorable claim

55. Article 47.b of the American Convention stipulates that the Commission shall declare inadmissible any petition that does not state facts that tend to establish a violation of the rights guaranteed by the Convention. The Commission will therefore proceed to examine whether the alleged facts regarding the civil action for damages against the surgeon and the hospital and the lack of effectiveness in the execution of the judgment therein could, if proven, tend to establish a violation of the articles of the American Convention cited by the petitioner.

56. In this petition, a series of arguments have been presented regarding the alleged violation of the rights to a fair trial and to judicial protection enshrined in Articles 8, 24, and 25 of the American Convention. In particular, the petitioner claims that the judgment issued by Chamber I of the CNAC on April 29, 1999, was arbitrary in that it was contrary to a precedent set by Chamber D of the CNAC, which would constitute a violation of the right to equality before the law established in Article 24 of the American Convention.

57. In turn, the State claimed that for a violation of Article 24 of the American Convention to be established, it must be shown, at the least, that the court ruled in a radically different way in a previous judgment involving a legal situation with almost identical elements, but that this is not so in the case at hand since the petitioner failed to identify the similarities between the two cases, and that what the petitioner is actually seeking is for the Commission to act as a judicial "fourth instance."

58. According to the established precedents of the inter-American system, the Commission is not empowered to review "decisions handed down by national courts acting within their authority and applying the appropriate legal guarantees, unless it is found that there has been a violation of some right protected by the Convention."¹⁸ The Commission has repeatedly maintained that:

Under the preamble of the American Convention on Human Rights, the protection that the organs of the inter-American system for the protection of human rights offers is intended to complement the protection afforded by the local courts. The Commission cannot take upon itself the functions of an appeals court in order to examine alleged errors of fact or law that local courts may have committed while acting within the scope of their jurisdiction, unless there is unequivocal evidence that the guarantees of due process recognized in the American Convention have been violated.¹⁹

59. In this petition the Commission notes that regarding the application of statutory limitations to the civil suit, Chamber I of the CNAC said that "if the plaintiffs wished to keep the action against the Posadas Hospital alive, they could have filed suit against it, without prejudice to the suspension of the civil proceedings" established in Art. 1110 of the Civil Code, and that "if the result is unjust, that can only be attributed to omissions or negligence on the part of the interested party." In addition, the Commission believes that it does not have sufficient elements to conclude that the

¹⁸ IACHR, Report No. 8/98, Case 11.671, Carlos García Saccone, Argentina, March 2, 1998, para. 53.

judgments of these two chambers of the CNAC described as being analogous actually shared certain relevant properties that could be classified as essential,²⁰ as is required to determine a possible violation of Article 24 of the American Convention.

60. In light of the above considerations, the Commission concludes that it is not competent to analyze the State's alleged international responsibility through the judgments handed down by the judicial authorities in the civil proceedings. Indeed, the Commission notes that the issues raised by the petitioner would require the IACHR to review the enforcement of the laws applicable to the petition in order to determine the admissibility of his claims,²¹ particularly as regards the triggering of statutory limitations in civil actions.

61. Regarding the alleged ineffective execution of the civil judgment for damages, the Commission notes that the parties have stated that since 2001, the alleged victim's family has been receiving regular amounts of money in compliance with that judgment. Accordingly, the Commission does not have sufficient elements to rule on the State's possible violation of the American Convention, and so it finds that this aspect of the petition is inadmissible in accordance with Article 47.b of the American Convention.

62. To summarize, as regards the proceedings related to the alleged victim's death in the hospital, the information provided does not indicate that judicial arbitrariness was involved, that the alleged victims were denied access to the remedies provided by domestic law with the guarantees of legal due process, or that there were shortcomings in the execution of the corresponding judgment.

63. The IACHR believes that in this petition, it must find that the petitioner's claims regarding the lack of effectiveness of and the irregularities in the criminal investigation into the injuries suffered by the alleged victim could tend to establish a possible violation of his family's rights to a fair trial and to judicial protection as enshrined in Articles 5, 8, and 25 of the American Convention, in conjunction with Article 1.1 thereof.

64. Neither the American Convention nor the IACHR's Rules of Procedure require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. Instead, it 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.

65. In light of the age of the alleged victim, at the merits stage the Commission will analyze the possible application of Article VII of the American Declaration with regard to the claims that neither a juvenile judge nor a minors' advisor was involved in the first stages of the proceedings or in the subsequent investigation; similarly, it will consider the possible application of Article 19 of the American Convention with regard to the stages that occurred after that instrument came into force for Argentina.

²⁰ See: I/A Court H. R., *Case of Castañeda Gutman v. Mexico*, Judgment of August 6, 2008, Series C No. 184, para. 170.

²¹ See: IACHR Report No. 27/07. José Antonio Aguilar Angeletti. Peru. March 9, 2007. paras. 41 and 43; and Report No.

66. Thus, and in accordance with the rules for interpreting human rights contained in the American Convention,²² with the criteria established by the Inter-American Court of Human Rights regarding the tendency to integrate the regional and universal systems,²³ and with the notion of a *corpus juris* as regards the protection of children and adolescents,²⁴ the Commission will interpret the scope and content of the allegedly violated rights of the adolescent Marcelo Fabián Nievas in light of the terms of the United Nations Convention on the Rights of the Child.²⁵

V. CONCLUSIONS

1. Based on the foregoing considerations of fact and law, the Commission concludes that it is competent to examine the petitioner's claims regarding the alleged violation of Articles 5, 8, 19, and 25, of the American Convention, in accordance with Article 1.1 thereof, and of Article VII of the American Declaration, and that those contentions are admissible as regards the criminal investigation into the injuries inflicted on the alleged victim.

2. In addition, it concludes that the petition is inadmissible as regards the alleged violation of Articles 4, 8, 10, 24, and 25 of the American Convention, in accordance with Article 47.a thereof, due to the lack of timeliness and failure to establish a colorable claim of Convention violations in the civil and criminal proceedings brought as a result of the alleged victim's death, as indicated in the preceding analysis.

3. 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 5, 8, 19, and 25 of the American Convention, in conjunction with Article 1.1 thereof, and as regards Article VII of the American Declaration, with respect to the family of Marcelo Fabián Nievas.

2. To declare this case inadmissible as regards Articles 4, 8, 10, 24, and 25 of the American Convention on Human Rights, pursuant to the analysis set out above.

3. To notify the parties of this decision.

²² 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.

²³ 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.

²⁴ 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.

²⁵ IACHR Report No. 74/09. Mickey Alexis Mendoza Sánchez and Family. August 5, 2009, para. 29; and Report No. 72-09.

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 4th day of November 2013. (Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Rose-Marie Belle Antoine, Felipe González, Rodrigo Escobar Gil and Dinah Shelton, Commissioners.