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REPORT No. 163/18

PETITION 1116-07

REPORT ON ADMISSIBILITY

PAULO IGOR DO NASCIMENTO PINTO ET AL
BRAZIL

Approved electronically by the Commission on December 12, 2018.

Cite as: IACHR, Report No. 163/18. Petition 1116-07. Admissibility. Paulo Igor do Nascimento Pinto, Rafael Carvalho da Costa et al. Brazil. December 12, 2018.



I. INFORMATION ABOUT THE PETITION

Petitioner:	Public Defender's Office of the State of Rio de Janeiro – DPE/RJ
Alleged victims:	Paulo Igor do Nascimento Pinto et al ¹
Respondent State:	Brazil ²
Rights invoked:	Articles 4 (life), 5 (humane treatment/personal integrity), 19 (rights of the child) and 25 (judicial protection), all in conjunction with Articles 1.1 and 2 of the American Convention on Human Rights ³ and Articles 10 (healthy environment), 13 (education), 16 (rights of children) and 18 (protection of the handicapped) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”) ⁴

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition:	August 27, 2007
Additional information received during examination of the petition:	December 1 and 22, 2008; December 1, 2009, and February 17, 2012
Notification of the petition to the State:	June 24, 2014
State's first response:	October 28, 2014
Additional observations by the petitioner:	December 10, 2014, January 8 and June 17, 2015, and February 16, 2018
Additional observations by the State:	March 11, 2015 and July 19, 2017

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (instrument adopted on September 25, 1992) and Protocol of San Salvador (instrument deposited non August 21, 1996)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES, AND TIMELINESS OF THE PETITION

Duplication of procedures and international <i>res judicata</i>:	No
Rights declared admissible:	Articles 4 (life), 5 (humane treatment/personal integrity), 8 (judicial guarantees), 19 (rights of the child), 24 (equal protection), 25 (judicial protection), and 26 (economic, social, and cultural rights), all in conjunction with Articles 1.1 and 2 of the American Convention on Human Rights and Article 13 (education) of the Protocol of San Salvador

¹ Rafael Carvalho da Costa, Iago de Souza Lorenzet, Gabriel Pedro Pereira Perdigão, Eduardo Duarte Alves, Willian Coutinho Lima, Douglas de Castro Alves, Renato Garcia Rocha, Felipe Marques Victoria, David Germano Ramos, Iuri Vale de Oliveira, and Matheus da Silva Chaves.

² Pursuant to Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Flávia Piovesan, a Brazilian national, did not participate in the discussion or decision in this matter.

³ Hereinafter "Convention" or "American Convention".

⁴ Hereinafter "Protocol of San Salvador".

⁵ The observations submitted by each party were duly transmitted to the opposing party.

Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, the exception provided for under Article 46.2.c of the American Convention applies
Timeliness of the petition:	Yes, as per Section VI

V. ALLEGED FACTS

1. The present petition has to do with the alleged lack of comprehensive and specialized government guarantees to provide health care and education for persons with Autistic Spectrum Disorders (hereinafter “ASD”) in the state of Rio de Janeiro (hereinafter “state”). According to the petitioner, the alleged dearth of appropriate public policies constitutes a violation of the human rights of the alleged victims referred to in this petition, namely: Paulo Igor do Nascimento Pinto (born on June 3, 1993), Rafael Carvalho da Costa (born on December 15, 1995), Iago de Souza Lorenzet (born on January 24, 1996), Gabriel Pedro Pereira Perdigão (born on June 29, 1994), Eduardo Duarte Alves (born on March 13, 1993), Willian Coutinho Lima (born on August 28, 1986), Douglas de Castro Alves (born on April 30, 1998), Renato Garcia Rocha (born on April 15, 1989), Felipe Marques Victoria, David Germano Ramos (born on May 4, 1987), Iuri Vale de Oliveira (born on December 17, 1990), and Matheus da Silva Chaves.

2. In 2004, the Office of the Public Defender of the state of Rio de Janeiro (hereinafter “the petitioner” or “DPE”) wrote to the São Paulo State Public Health Secretariat requesting information regarding treatments available for autistic persons. In its reply, the state provided a list of all the Psycho-Social Care Centers (hereinafter “CAPS”) operating in the state and pointed out that they are administered by the municipalities. When looking for information on care for persons with ASD on the websites of both CAPS, the petitioner ascertained that mental illness-related services only cover psychosis and severe neurosis, with no mention being made of ASD. Also in 2004, the DPE wrote to the São Paulo State Education Secretariat to find out what specialized educational facilities were available for ASD children and was told in response that only one educational center received them. Thus, the DPE concluded that “the care provided by the state for autistic persons is not just inadequate, but also sporadic and dispersed, with no one full-time facility providing all the activities needed for that segment of the population to develop.” According to the DPE that was tantamount to condemning those children to “social death”, bearing in mind that the lack of comprehensive and appropriate care in health and education facilities means that there are no guarantees for their development as persons and insertion into society.

3. Against that backdrop, on March 31, 2005, the DPE, together with the Mão Amiga Association of Parents and Friends of Autistic Persons, filed a “Public Civil Action” (ACP) lawsuit against the state of Rio de Janeiro, arguing that Article 23.II of the Constitution renders the Federal Government, states, federal district, and municipalities jointly responsible for caring for health and welfare, as well as for protecting and guaranteeing the rights of persons with disabilities. Moreover, it mentions that the state of Rio de Janeiro forms part of the Single Health System (hereinafter “SUS”) and that, apart from health, it is also responsible for providing comprehensive and multidisciplinary care for autistic persons. It further points out that Article 208.III of the Constitution establishes the duty of the State to provide specialized education for persons with disabilities, preferably within the regular educational system.

4. Given the urgency of the request, the petitioner requested a preliminary protection injunction (*antecipação de tutela*) in connection with the ACP. In the absence of a specific judicial response regarding the preliminary injunction, the petitioner reiterated the request in February 2007, which was granted in part on February 2, 2010. The ruling established that the state of Rio de Janeiro should make available, within a reasonable period of time, centers for attending to and treating children with ASD or should expand existing centers, and it set a 30-day deadline for compliance with the ruling. The state appealed against the preliminary injunction ruling. Only in August 2010 did the state report what measures would be taken to comply with the ruling handed down against it. Subsequently, on June 29, 2011, the ACP was ruled admissible and the state of Rio de Janeiro was ordered to provide its own specialized units, free of charge and offering a comprehensive set of health care, educational, and social welfare services, for autistic persons. The judgment handed down confirmed the preliminary injunction. The petitioner alleges that the

state appealed the decision, arguing that it was up to the municipalities to fulfil that duty. On June 3, 2014, the appeal was turned down (*improvida*) and the judgment upheld. Nevertheless, on December 9, 2014, the Court of Justice of the state of Rio de Janeiro (hereinafter “TJRJ”) suspended provisional execution of the ACP judgment until a ruling was issued on the admissibility of the Extraordinary Appeal (hereinafter “RE”) filed by the state with the Federal Supreme Court (hereinafter “STF”). Subsequently, on April 14, 2015, it was decided to resume compliance with the judgment and to consider that it had been a mistake to suspend execution in connection with an appeal for review (*Agravo de Instrumento*), bearing in mind that new legislation provided for a different type of appeal in cases such as this.⁶

5. The DPE states that it conducted several visits and interviews with the families of the alleged victims and had ascertained that not only had there been virtually no improvement in care for autistic persons in the state; rather, it had got worse for lack of both material and human resources. It mentioned that a bill had been presented to the Legislative Assembly aimed at implementing comprehensive rehabilitation centers for persons with autism or mental disabilities. However, the DPE affirms that the whole bill was vetoed by the state governor: a clear demonstration of the lack of political will to grant the alleged victims access to health and education.

6. At the same time, the Brazilian State argues that the Inter-American Commission of Human Rights (hereinafter “Commission”) lacks competence *ratione materiae* to claim violations of Articles 10, 16, and 18 of the Protocol of San Salvador. It also alleges that the petitioner did not exhaust domestic remedies, as required under Article 46.1.a of the American Convention, because after denial of its first appeal to a higher court, the state of Rio de Janeiro had filed an Extraordinary Appeal to the STF and a Special Appeal (hereinafter “REsp”) to the Superior Court of Justice (hereinafter “STJ”), both of which are still awaiting a decision on admissibility by the Court of Justice of Rio de Janeiro.⁷

7. The Brazilian State argues that the present petition does not describe facts constituting violation of the American Convention, given the progressive nature of implementation of social rights. Thus, it points to various – legislative and administrative – measures adopted by the national and state governments after the preliminary injunction ruling in the ACP, aimed at addressing the needs of persons with ASD. On February 9, 2015, the State alleges that the judge of the 9th Court of the Treasury in the Capital (*9ª Vara da Fazenda Pública da Capital*) ratified the grounds for suspending execution of judgment, a decision that the DPE had appealed before the TJ.

8. The State further argues that the petitioner’s allegation of an omission tending to generate risks to the life and personal integrity of the alleged victims does not specify what harm they could do or which might occur. Rather, the allegation limits itself to making generic arguments, besides referring without distinctions to all autistic persons in the state of Rio de Janeiro. Finally, the State points out that, despite all the efforts undertaken to promote the rights of autistic persons, the subject is one that pertains to the sphere governed by the principle of domestic discretion and the Commission is not empowered to tell a government how it should implement public policies domestically.

VI. ANALYSIS OF THE EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

9. According to information in the public domain, the Commission notes that, on September 22, 2014, the state of Rio de Janeiro filed an REsp and an RE against the ruling handed down by the local Court of Justice and that both appeals were denied in a ruling on October 29, 2014. The state filed a special appeal for review, which was denied by the STJ on May 31, 2016, and the decision became final on August 15, 2016. In addition, the state also filed an Extraordinary Appeal for Review, processing of which was halted by the Court of Justice, at the behest of the STF, until analysis of the issue of General Repercussion (*Repercussão Geral*) No.

⁶ Law 12.322/2010 established that the appropriate appeal against a ruling that does not allow an Extraordinary or Special Appeal is not the Appeal for Review of the mechanism applied (*Agravo de Instrumento*) but, rather, an appeal for review of the proceedings themselves (*Agravo nos próprios autos*).

⁷ In its arguments, the State did not specify the dates of the appeals.

698 – Restriction on the Judiciary’s determining of the State’s obligations to act in respect of public competitive bidding, hiring of civil servants, and execution of works to address the social right to health care, which is accorded special protection under the Constitution of the Republic.”

10. Article 46.2.c of the American Convention and Article 31.2.c of the Commission’s Rules of Procedure establish as an exception to exhaustion of domestic remedies unwarranted delay in rendering a final judgment on appeals filed by the alleged victim before domestic courts. It transpires that, while there are no provisions in the Convention or the Rules of Procedure specifying the lapse of time that constitutes “unwarranted delay”, the Commission must analyze each case on its own merits to ascertain whether or not the exception applies. In the instant case, based on the facts presented by the Parties, the Commission notes that more than 13 years have elapsed without a final judgment being handed down and that the alleged victims could be being harmed by the delay in reaching a judicial decision, because of the absence of guaranteed access to specialized and comprehensive health care and education.

VII. COLORABLE CLAIM ANALYSIS OF THE ALLEGED FACTS

11. Based on the elements of fact and law presented by the Parties and the nature of the instant case, the Commission considers that, if they are proved, the facts described constitute possible violations of the rights to Articles 4 (life), 5 (humane treatment/personal integrity), 8 (judicial guarantees), 19 (rights of the child, 24 (equal protection), 25 (judicial protection), and 26 (economic, social, and cultural rights), all in conjunction with Articles 1.1 and 2 of the American Convention on Human Rights and Articles 13 (education) of the Protocol of San Salvador.

12. In addition, regarding its alleged lack of competence *ratione materiae* to declare violations of the right to health proclaimed in the Protocol of San Salvador, the Commission observes that the competence envisaged under Article 19.6 of the aforementioned treaty to pronounce in the context of an individual case is limited to Articles 8 and 13. With respect to the other Articles, in accordance with Article 29 of the American Convention, the Commission can take them in account when interpreting and applying the American Convention and other applicable instruments. Moreover, the Commission notes that the ACP, brought in 2005, has continued to be pending for more than 13 years without a final judgment being handed down by the Brazilian judiciary, which could be characterized as a violation of reasonable timeliness.

VIII. DECISION

1. To declare the present petition admissible in respect of Articles 4, 5, 8, 19, 24, 25, and 26 of the American Convention, in conjunction with Articles 1.1 and 2 thereof; and in respect of Article 13 of the Protocol of San Salvador.

2. To declare the present petition inadmissible in respect of Articles 10, 16, and 18 of the Protocol of San Salvador.

3. To notify the Parties of the present decision; continue analysis of the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 12th day of the month of December (Signed): Margarette May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, and Antonia Urrejola, Commissioners.