

REPORT No. 10/11
CASE 12.329
ADMISSIBILITY
VICENTE ARIEL NOGUERA
PARAGUAY
March 22, 2011

I. SUMMARY

1. On October 17, 2000, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the IACHR”) received a petition presented by Ms. María Ramona Isabel Noguera Domínguez, in her own name and in the name of the Asociación de Familiares Víctimas del Servicio Militar [Association of Families Victims of Military Service] (hereinafter “AFAVISEM” or “the petitioner”), which alleges the international responsibility of the Republic of Paraguay (hereinafter “Paraguay,” “the Paraguayan State,” or “the State”). The petition alleges violations of the right to life, the right to humane treatment, the right to a fair trial, the rights of the child, and the right to judicial protection guaranteed respectively in Articles 4, 5, 8, 19, and 25 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”), to the detriment of the minor Vicente Ariel Noguera, the petitioner’s son

2. The petitioner stated that Vicente Ariel Noguera, who at the time of the facts was 17 years old, had died in “circumstances that were not clarified” while fulfilling his second period of compulsory military service, with the rank of corporal candidate. She added when her son’s body was delivered, it had several wounds and there was blood on his underwear, as if he had been sexually abused. She said that despite the complaints filed, there had been no proper investigation of the facts. The military justice system decided not to order an inquiry into the alleged victim’s death because “there was no offense to investigate nor any criminal to punish,” and the civilian jurisdiction decided to archive the case because it had not been possible to identify the individual responsible for the death and for lack of initiative by the complainant.

3. When processing of the petition began, the State expressed its willingness to reach a friendly settlement in the case and provided the following information: **a)** that Vicente Ariel Noguera had been promoted posthumously to Reserve Second Lieutenant; **b)** that a monthly pension had been granted to Ms. María Ramona Isabel Noguera Domínguez; **c)** that in an interlocutory order of October 27, 1997, the Military Lower Court had dismissed the case in its entirety and ordered the proceedings archived; and **d)** that in the civilian jurisdiction, since no alleged perpetrators had been identified and there had been lack of initiative by the complainant, the case had been archived. In August 2007, the State reported that as of the date of the alleged victim’s death, there was no prohibition in Paraguay against military service under the age of 18; it noted subsequent advances in Paraguayan legislation that established a total ban on military service by minors under 18. At that time, the Paraguayan State asked the Commission to archive the instant case.

4. After analyzing the parties’ positions, the Inter-American Commission concluded that it has competence to decide on the petition submitted by the petitioner, which is admissible in the light of Article 46 of the American Convention, concerning the alleged violations of the right to life, the right to humane treatment, the right to a fair trial, the rights of the child, and the right to judicial protection guaranteed respectively in Articles 4, 5, 8, 19, and 25 of the American Convention, in connection with Articles 1.1 and 2 of the same instrument. The Commission therefore decided to notify the parties, to continue to analyze the merits of the alleged violations of the American Convention, to publish this Report on Admissibility, and to include it in its annual report to the OAS General Assembly.

II. PROCESSING BY THE COMMISSION

5. On October 17, 2000, the Inter-American Commission received a petition presented by Ms. María Ramona Isabel Noguera Domínguez, in her own name and in the name of the Association of Families Victims of Military Service (AFAVISEM), which was assigned number 12.329. On October 24, 2000, the

IACHR transmitted the petition to the Paraguayan State, giving it 90 days to submit its observations. In a note of December 7, 2000, the State expressed its willingness to reach a friendly settlement in the case; that note was forwarded to the petitioner on January 18, 2001. The petitioner responded in a note received on November 14, 2001, making some requests with respect to a friendly settlement; that note was forwarded to the State the same day.

6. The State presented additional information in notes of January 23, February 12, April 12, June 26, and August 23, 2001; June 5, 2003; and September 16, 2004. These communications were duly forwarded to the petitioner.

7. In communications of April 29, 2003, and August 4, 2004, the Commission requested specific information about the case from the Paraguayan State, and received a response in due course.

8. In a communication of September 22, 2005, the petitioner notified the Commission she was withdrawing from efforts to reach a friendly settlement with the Paraguayan State, owing to the lack of progress in the procedure. On September 4, 2007, when the Rapporteur at the time was visiting Paraguay, he met with representatives of the State and the petitioner to discuss the matter.

9. In a note of May 18, 2009, the Commission asked the petitioner for specific information on the case, and repeated this request on May 18, 2010. The Commission received communications from the petitioner on August 18, September 24, October 7 and 11, and December 1, 2010.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

10. The petitioner said her son, Vicente Ariel Noguera, was born on April 29, 1978, and at the age of 15 entered compulsory military service in perfect health. She said that on January 2, 1996 he was transferred from the CIMEFOR (Reserve Officers Military Training Center) to Lagerenza in the Paraguayan Chaco and died nine days later. She said that the official versions of her son's cause of death ranged from "sudden death," to Hantavirus, to generalized infection, with the last one prevailing.

11. With respect to the legal actions pursued, the petitioner said she filed a complaint on January 17, 1996, with the ordinary justice system on which little action was taken, and according to the petitioner, the matter was virtually paralyzed until January 26, 1998. Among the steps taken in the investigation, the petitioner noted the autopsy, with findings that the cause of death was "acute interstitial pneumonitis of a viral type," even though there was evidence of a blow on the head and traces of blood. She said that an investigation was started in the military justice system, which had been dropped because "there was neither offense to investigate nor any criminal to punish."

12. The petitioner said that some of the soldiers had told her that two lieutenants had punished Vicente Ariel to "give him a lesson" but "they got carried away"; that they had seen the lieutenants kick him and take him to the punishment cell. Others had said they were sure her son was victim of rape and torture, and all of them said that Vicente Ariel was not sick on the day he died. The petitioner said that notwithstanding this, those soldiers had not provided that information in their statements to the authorities and some had even denied it. The petitioner said that one of her son's comrades had told her that they all had been threatened with discharge if they told what had really happened to Vicente Ariel.

13. The petitioner added that since 1989 there had been 102 deaths of underage soldiers, and that she, along with other mothers, had founded the AFAVISEM organization and that as result of its efforts, she had managed to obtain a pension.

B. Position of the State

14. In its first communications, the Paraguayan State expressed its interest in a dialogue leading to friendly settlement of the case, and sent the Commission general information about compulsory

military service and copies of the legislation governing it, as well as reports of the visits by the Congressional Committee on Human Rights to military units in July 2001 to investigate general allegations of recruitment of minors in the armed forces.¹

15. The State reported that Federal Executive Decree N° 12.229 of January 14, 1996, promoted Vicente Ariel Noguera posthumously to the next higher grade, and a decree on February 2, 1996, promoted him to Reserve Second Lieutenant. It said that Federal Executive Decree N° 17.506 of June 13, 1997, awarded a monthly pension of 892.000 guaraníes to Ms. María Ramona Noguera Domínguez as the legitimate heir of Vicente Ariel Noguera. It also said that in an interlocutory order of October 27, 1997, the Military Lower Court had dismissed the case in its entirety and ordered the proceedings archived.

16. With its note of September 16, 2004, the State sent copies of the principal actions held in the judicial proceeding “Request for judicial investigation requested by María Ramona Noguera,” opened in 1996. It said that all due diligence had been taken in the investigation, including the hearing of testimonies and the exhumation of the corpse in September 1996, and that the cause of death had been determined to be “acute interstitial pneumonitis of a viral type, with no signs of trauma.” The case was archived by resolution of November 6, 2002, pursuant to Article 7 of Law 1444/99, which stipulates that “in proceedings with an unidentified accused, the court shall order the case to be archived, unless within a period of six months the Public Prosecutor’s Office or the parties submit motions or conduct pertinent acts or investigations to keep it open.”

17. The State said that Paraguay ratified the Convention on the Rights of the Child in 2002, so as of the date of facts, there was no prohibition against military service under the age of 18. It noted advances in Paraguayan legislation with respect to the draft law that would amend Laws N° 569/75 on Compulsory Military Service, and 123/52 on the Reserve Officers Military Training (CIMEFOR). That draft law included a total ban on military service by minors under 18.

18. Based on the arguments presented, the Paraguayan State asked the Commission to archive the instant case.

IV. ANALYSIS OF ADMISSIBILITY

A. Commission’s competence *ratione materiae*, *ratione personae*, *ratione temporis*, and *ratione loci*

19. Article 44 of the American Convention provides that “Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.” The petitioner is therefore eligible to submit a petition to the Inter-American Commission. Hence, the IACHR has *ratione personae* competence for this case.

20. The State of Paraguay has been a State Party to the American Convention since August 24, 1989, date on which it deposited its instrument of ratification. The petitioner, for her part, alleges violations of rights established in the American Convention. The IACHR therefore has *ratione materiae* competence for the instant case.

21. The Inter-American Commission has *ratione loci* competence, given that the alleged violations of human rights occurred in a State Party to the American Convention. Similarly, the Commission has *ratione temporis* competence because the American Convention was in force for the Paraguayan State when the facts alleged in the petition were said to have occurred.

B. Other requirements for the admissibility of the petition

¹ In analyzing those reports, the Commission noted that the petitioner, representing AFAVISEM, accompanied the Congressional Committee on the visits, along with representatives of SERPAJ and CEJIL.

1. Exhaustion of domestic remedies

22. Article 46.1.a of the American Convention stipulates, as a requirement for admission of a petition under the terms of Article 44 of that treaty, that remedies under domestic law have been exhausted in accordance with generally recognized principles of international law. This is a procedural requirement of the Commission to give states an opportunity to be informed of alleged violations of a right protected in the framework of the American Convention so that they have the opportunity, if possible, to correct them within their jurisdiction before they are considered at the international level.

23. The same Convention stipulates that this provision shall not be applicable when domestic remedies are unavailable for *de facto* or *de jure* reasons. Specifically, Article 46.2 establishes exceptions to the general principle of exhaustion of domestic resources 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; (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

24. Article 31.3 of the Inter-American Commission's Rules of Procedure stipulates that when the petitioners allege an exception to the exhaustion of domestic remedies, it is up to the State to show that remedies under domestic law have not been previously exhausted, to indicate the appropriate recourse for redress, and to provide proof of its effectiveness. In this case, the State has not alleged the lack of exhaustion of domestic remedies, nor has it indicated the existence of other remedies that the petitioner should have invoked.

25. The petitioner has held that this case should be exempt from the requirement of exhaustion of domestic remedies, as provided in Article 46.2.c of the American Convention, because of the unwarranted delay in investigating the facts and punishing those found responsible. She also alleged that there was no sufficient or adequate investigation.

26. The petitioner filed her complaint with the ordinary justice system on January 17, 1996, six days after her son's death, and the case was archived in November 2002. The petitioner alleges that the authorities never conducted an investigation to clarify the facts of her son's death and determine who is responsible for it.

27. According to the available information, the case was archived because six months had elapsed without starting the proceedings or identifying the accused. This was pursuant to Article 7 of Law 1444/99, which governs the transition period to the new criminal procedure system.²

28. Although Article 7 of Law 1444/99 states that an investigation can be reopened if the Public Prosecutor's Office or the victim file specific charges, there is no information to indicate that after the archiving the State had made additional efforts to investigate. In this respect, the Commission notes that according to its doctrine:

[...] Whenever a prosecutable offense is committed, the State has the obligation to initiate and pursue the criminal proceeding to its ultimate consequences [...].

[...] Regarding crimes of public action, and even in those which may be prosecuted by a private actor, it is not valid to demand exhaustion of domestic remedies to the victim or the victim's relatives, for

² That article states:

Article 7°.- ARCHIVING:

In proceedings with unidentified accused, the court shall order the case to be archived, unless within a period of six months the Public Prosecutor's Office or the parties submit motions or conduct pertinent acts or investigations to keep it open.

Files archived in this manner can serve as background documentation if the victim or the Public Prosecutor's Office start a new action based on specific charges.

the State has a duty to maintain public order, and therefore it has an obligation to set the criminal law system into motion and to process the matter until the end.³

29. In light of the foregoing considerations, the Commission concludes that the petition falls within the exception to the requirement for exhaustion of domestic remedies contemplated in Article 46.2.c of the Convention, because of unwarranted delay in resolving the case.

2. Deadline for presentation

30. Article 46.1.b of the Convention requires that in order for petitions to be admissible they be submitted within six months of notification of the final judgment to the complainant. However, in accordance Article 46.2 of the Convention and Article 32.2 of the IACHR Rules of Procedure, “The provisions of the preceding paragraph shall not apply when: the domestic legislation of the State concerned does not afford due process of law ...; the party ... has been denied access to the remedies under domestic law...; or there has been unwarranted delay in rendering a final judgment. [...]. This rule shall also not apply when the complaint refers to a continuing situation, when it is alleged that the victim’s rights are violated without interruption.”

31. The Commission concludes that the requirement established in Article 46.1.b does not apply, given the unwarranted delay in investigations to clarify the facts, considering that the judicial investigation began in 1996, that as of the date of this report the complaints filed regarding the death of Vicente Ariel Noguera have not been clarified, and that in 2002, after the petition was filed, the non-definitive archiving of the investigation was ordered. The Commission therefore considers that the petition of October 17, 2000, was presented within a reasonable period, as established in paragraph 2 of Article 32 of the Commission’s Rules of Procedure.

3. Duplication of proceedings and international *res judicata*

32. Article 46.1.b of the Convention says that admission of a petition requires “that the subject of the petition or communication is not pending in another international proceeding for settlement,” and Article 47.d of the Convention stipulates that the Commission shall consider inadmissible any petition if “the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.” In this case, the parties have not put forward the existence of either of these two grounds for inadmissibility, and there is no indication of them in the proceedings.

4. Nature of the allegations

33. The Inter-American Commission must decide whether the facts described in the petition, if proved, would tend to establish a violation of the rights guaranteed in the American Convention as provided in the requirements of Article 47.b, or whether, according to Article 47.c, the petition should be rejected as “manifestly groundless or obviously out of order.” In this procedural phase it is up to the IACHR to make a *prima facie* evaluation, not in order to establish alleged violations of that treaty, but to examine whether the petition states facts that tend to establish a violation of the rights guaranteed in the American Convention. This analysis does not imply prejudgment or anticipation of the decision on the merits of the case.

34. With respect to Article 4, the Commission notes that the petitioner’s main allegation is that the death of Vicente Ariel Noguera occurred while he was in the custody of the Paraguayan State and could have resulted from negligence, mistreatment, or torture at the hands of State agents. Concerning the alleged violations of Article 5 of the American Convention, the petitioner has argued that her son’s physical health was excellent when he began compulsory military service, and was impaired by his recruitment.

³Report N° 52/97, Case 11.218, Arges Cerqueira Mangas, *Annual Report of the IACHR 1997*, paras. 96 and 97. See also Report No. 55/97, Juan Carlos Abella, para. 392, and Report 51/07, Marco Javier Zambrano and Javier José Rada vs Ecuador, para. 33.

35. The petitioner argues that since Vicente Ariel Noguera was 15 years old at the time of his recruitment, this violated the provision on the rights of the child established in Article 19 of the American Convention. The Commission notes that when the facts occurred, Paraguayan legislation permitted recruitment of people under the age of 18 in the armed forces. In this regard, and by virtue of the *iura novit curia* principle, in the merits phase the Commission will analyze whether the facts could constitute violations of the obligation to adopt domestic legislation as established in Article 2, in connection with Article 1.1 of the Convention.

36. The petition also states that the complaint regarding the death of Vicente Ariel Noguera was filed with the appropriate jurisdictional authorities on January 17, 1996, and that in November 2002 its non-definitive archiving was ordered, so more than 15 years have elapsed with no clarification of the facts. The petition says there was no serious, effective, and impartial investigation of the case, which could constitute a violation of the provisions of Articles 8 and 25 of the American Convention. In application of the *iura novit curia* principle, the Commission considers that if denial of justice were proved, it would tend to establish violations of the personal integrity of the alleged victim's family members, under the terms of Article 5 of the Convention.

37. The Commission concludes that in this case the petitioner has made allegations that, if they satisfy other requirements and are proved to be true, tend to establish a violation of rights protected by the American Convention; specifically, those set forth in Articles 4, 5, 8, 19, and 25, in connection with Articles 1.1 and 2 of the American Convention.

V. CONCLUSIONS

38. The Commission concludes that the case is admissible and it has competence to consider the petitioner's allegations regarding the alleged violation of the rights established in Articles 4, 5, 8, 19, and 25 of the American Convention, all in connection with the obligations established in Articles 1.1 and 2 of that international instrument.

39. Based on the foregoing arguments of fact and law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the petition admissible with respect to the rights guaranteed in Articles 4, 5, 8, 19, and 25 of the American Convention, in connection with the obligations established in Articles 1.1 and 2 of that treaty.
2. To transmit this report to the petitioner and the State.
3. To continue with the analysis of the merits of the case.
4. To publish this decision and include it in the Commission's Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on March 22, 2011. (Signed): Dinah Shelton, President; José de Jesús Orozco Henríquez, First Vice-President; Rodrigo Escobar Gil, Second Vice-President; Paulo Sérgio Pinheiro, Luz Patricia Mejía Guerrero, Felipe González, and María Silvia Guillén, members of the Commission.