

REPORT N° 76/08
ADMISSIBILITY
PETITION 1055-06
PAOLA DEL ROSARIO GUZMÁN ALBARRACÍN AND NEXT OF KIN
ECUADOR
October 17, 2008

I. SUMMARY

1. On October 2, 2006, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission" or the "IACHR") received a petition that the *Centro de Derechos Reproductivos* [Center for Reproductive Rights] and the *Centro Ecuatoriano para la Promoción y Acción de la Mujer* [Center for the Advancement and Action of Women] (CEPAM-Guayaquil) (hereinafter "the petitioners") lodged against the State of Ecuador (hereinafter "the State," "the Ecuadorian State" or "Ecuador") alleging its international responsibility for acts of harassment and sexual abuse, failure to provide medical care, and delays in criminal prosecution, to the detriment of Paola del Rosario Guzmán Albarracín (hereinafter "the alleged victim"), age 16. The petitioners allege that the assistant principal at the public school where Paola del Rosario was a student, took advantage of his position of authority to sexually harass the alleged victim. As a result she committed suicide. The petitioners allege further that the judicial and administrative systems have allowed these offenses to go unpunished.

2. The petitioners allege that the State is responsible for violation of the rights to life, to humane treatment, to personal liberty, to a fair trial, the rights of the child, to equal protection, and to judicial protection, provided in articles 4, 5, 7, 8, 19, 24 and 25 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), in conjunction with the general obligation to respect and ensure the Convention-protected rights, established in Article 1(1) of the Convention, and for violation of articles 3, 4 (subparagraphs a, b, c, and e), 5, 6(a), 7 (subparagraphs a, b, c, e, f and g) and Article 9 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter the "Convention of Belém do Pará), to the detriment of Paola del Rosario Guzmán Albarracín and her next of kin.

3. The State, for its part, alleges that the petitioners' claims are inadmissible because of the failure to exhaust the remedies under domestic law, required under Article 46(1)(a) of the American Convention, and that the allegations do not constitute violations of the American Convention. The State further contends that the courts have responded to the allegations promptly and lawfully and that there has been no action or omission that could compromise the State's international responsibility.

4. After examining the parties' positions and compliance with the requirements set forth in articles 46 and 47 of the American Convention, the Commission has decided to declare the complaint as regards to the petitioners' allegations of the violations of articles 4, 5, 8, 19, 24 and 25 of the American Convention, in conjunction with Article 1(1) thereof, and Article 7 of the Convention of Belém do Pará to be admissible. Accordingly, the Commission decided to notify the parties of the present report and order its publication.

II. PROCESSING BEFORE THE COMMISSION

5. The IACHR registered the petition as number P-1055-06 and on February 8, 2007 proceeded to transmit a copy of the pertinent parts of the petition to the State. It gave the State two months in which to present its response, pursuant to Article 30 (subparagraphs 2 and 3) of the Rules of Procedure.

6. On November 16, 2007, the State presented its observations, which were forwarded to the petitioners on August 22, 2008. The latter were invited to present their observations within twenty days. On November 27, 2007, the State presented its observations, which were forwarded to the petitioners on December 17, 2007. The petitioners were given one month in which to reply. On October 10, 2007, the Allard K. Lowenstein International Human Rights Law Clinic of Yale University Law School filed an *amicus curiae* brief supporting the petitioners' allegations. That brief was transmitted to both parties on November 16, 2007.

7. On January 15, 2008, the petitioners requested an extension for purposes of presenting their observations. The Commission acceded to their request on January 18, 2008, and gave the petitioners a one-month extension to submit their observations. The petitioners filed their reply on February 18, 2008, which was forwarded to the State on April 17, 2008. The latter was asked to present its observations within one month's period. On May 20, 2008, the State requested an extension, which the Commission granted on May 28, 2008, giving the State a June 17, 2008 deadline for filing its observations. However, the period set elapsed without observations being received from the State.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

8. The petitioners allege that Paola del Rosario Guzmán Albarracín, age 16, was a student in the third year of the basic curriculum at the "Dr. Miguel Martínez Serrano" National Technical High School for Business and Administration, which is a public school under the supervision of the Ministry of Education of the Republic of Ecuador and located in Guayaquil. They contend that in 2001, when the alleged victim was 14 and in her second year of the basic curriculum, Paola del Rosario began to have difficulties in two subjects, and was facing the prospect of having to repeat the year. They allege that the assistant principal of the school offered to help her "on the condition that she would go out with him."¹ They allege further that Paola del Rosario told her mother, Petita Paulina Albarracín Albán, about the offer of assistance, but did not tell her of the condition that the assistant principal had set. They assert that the mother met with the assistant principal and decided that her daughter should repeat the school year, which is what allegedly happened.

9. The petitioners contend that the assistant principal continued to harass Paola del Rosario for the rest of the school year. The petitioners note, for example, how Paola del Rosario told a friend that the assistant principal had "forced her to touch his genitals by cornering her against his desk" and how

¹ Original petition received at the IACHR at October 2, 2006, paragraph 3.

he had sexual relations with Paola del Rosario starting in October 2002.² They also indicate that in the past, other students and female teachers at the high school had accused the assistant principal of sexual harassment.³ The petitioners even note that one of the female teachers who founded the high school told the authorities that in November 1988 the assistant principal had tried to lock her in his office; as a result, the assistant principal was briefly removed from his post, although he was reinstated “almost immediately.”⁴

10. The petitioners contend that Paola del Rosario Albarracín Guzmán was the victim of the crimes of sexual harassment and statutory rape by the assistant principal at her school and was purportedly left pregnant as a result. On November 20, 2002, the alleged victim had told her schoolmates and friends that she had decided to end her pregnancy by an injection from her school doctor. The petitioners contend that according to the testimony of Eloísa Troncoso, a friend of the alleged victim, the school doctor would only help the alleged victim if she agreed to have sexual relations with him.

11. The petitioners allege that on December 12, 2002, at around 10:30 in the morning and while still at home, the alleged victim swallowed “11 diablillos” [small, penny-size fireworks] containing white phosphorous, all as a result of the abusive situation in which she found herself. They point out that on the school bus that day, the alleged victim had told her friends what had happened and what she had done. Her friends took her to the infirmary of the school and called her mother. The petitioners contend that the school authorities did not tell the alleged victim’s mother what had happened and did not take the necessary steps to have her taken to the hospital, even though she was under the State’s care in the school infirmary.

12. The petitioners contend that it was not until the mother arrived at the school thirty minutes later that Paola del Rosario was taken to a hospital, “where she died some hours later.”⁵ They allege that, as the record of the

² The petitioners cite as a source the testimony that two friends of Paola del Rosario gave during the preliminary investigation (1993-2002) against the assistant principal, mentioned later in the report. Original petition received at the IACHR on October 2, 2006, paragraph 4.

³ Original petition received at the IACHR on October 2, 2006, paragraph 17.

⁴ Original petition received at the IACHR on October 2 2006, paragraph 17.

⁵ The petitioners’ brief of observations, received at the IACHR on February 20, 2008, p. 2.

criminal case shows, a call for a taxi by the school doorman –on express orders from the school’s assistant principal- was the only help that the alleged victim’s mother received in getting her daughter to a hospital. They contend that on that same day, the alleged victim died at the “Clínica Kennedy” in Guayaquil, from intoxication caused by voluntary ingestion of white phosphorous.

13. The petitioners argue that the parents of Paola del Rosario have exhausted all remedies of the domestic legal system, in the criminal, civil and administrative-law jurisdictions and that none of these remedies has been effective in redressing the violations alleged. The petitioners specifically claim that: “The criminal case has been suspended for over two years; the resolution of the administrative-law case was a complete whitewash of the sexual aggression committed against Paola; the civil venue is not the proper one to obtain full redress for the pain and suffering caused to Petita and her family, and will never be effective so long as he [the assistant principal] remains a fugitive from justice.”⁶ The petitioners argue that by the irregularities and the unwarranted delays, particularly in the criminal case and the administrative law case, the Ecuadorian State has been complicit in allowing the alleged violations to go unpunished and in the cover-up of the sexual violence committed against the alleged victim, and has thus frustrated the family’s legitimate expectation of justice.

14. The petitioners contend that on December 16, 2002, the alleged victim’s father, Máximo Guzmán, brought a criminal complaint against the high school’s assistant principal, which he lodged with the Office of the Public Prosecutor of Guayas and Galápagos. The complaint was referred to the Sex Crimes Unit of the Guayas District Attorney’s Office. On June 12, 2003, when the preliminary investigations were completed, the prosecutor decided to charge the assistant principal with the crime of sexual harassment. On July 15, 2003, the Twentieth Criminal Judge of Guayas assumed jurisdiction over the case and on August 22, 2003, the Prosecutor petitioned the court seeking an order of preventive detention against the accused. On September 10, 2003, the judge denied the petition seeking preventive detention, arguing that the attached documentation did not alter the accused’ legal status. The petitioners observe that the prosecutor appealed the decision. On December 18, 2003, the Third Chamber of the Superior Court overturned the decision of

⁶ Original petition received at the IACHR at October 2, 2006, paragraph 87.

the judge *a quo* and ordered the accused' preventive detention. On January 5, 2004, the Judicial Police were allegedly ordered to take the accused into preventive custody. The petitioners contend that to this day, that arrest warrant has never been carried out.

15. They contend that on October 13, 2003, the alleged victim's mother filed a specific charge against the assistant principal during the criminal case, accusing him of rape and instigation to commit suicide. The petitioners allege, however, that the order binding the accused over for trial made no reference to the mother's accusation, and focused instead only on the crime of sexual harassment, thereby minimizing the severity of what had happened. The alleged victim's mother filed a petition for recusal against the Twentieth Criminal Judge of Guayas on November 11, 2003; and on May 4, 2004 that judge was finally removed from the criminal case.

16. The petitioners state that on August 23, 2004, definitive orders for trial and arrest were issued against the accused. They assert that to date, the assistant principal has not been made to appear for trial and there is no evidence that the accused has paid the bond necessary for him to remain free during the proceedings. They further allege that the order for trial was suspended until he was taken into custody or had voluntarily surrendered. On September 22, 2004, the accused filed appeals and petitions seeking nullification of the order binding him over for trial, on the grounds that it was in violation of the procedure provided by law. On September 2, 2005, the Superior Court dismissed the appeal –thereby confirming the order binding the accused over for trial. The Superior Court also amended the indictment on the grounds that the criminal offense was aggravated statutory rape, not sexual harassment.

17. As for the administrative proceeding, the petitioners observe that the alleged victim's mother filed a complaint with the Office of the Regional Under Secretary for Education, accusing the assistant principal of sexual harassment. They contend that on January 21, 2003, the case was referred to the Guayas Office of the Provincial Director of Education, which issued a report on January 23, 2003 in which it concludes that the alleged victim was in love with the assistant principal, but there was no way of knowing whether

her feelings were reciprocated.⁷ The petitioners contend that the exculpatory report issued in the administrative jurisdiction did not take into account the alleged victim's vulnerable condition and issued findings prejudicial to her.⁸ They maintain that on the heels of this report, the Office of the Provincial Director of Education suspended any investigation. It was only at the insistence of the alleged victim's mother that a committee of inquiry was finally appointed on May 14, 2003. They assert that in a preliminary report on March 9, 2004, the Office of the Provincial Director of Education concluded that the assistant principal had committed the offense of unjustified abandonment of post.⁹ On March 23, 2004, the Provincial Commission of National Defense therefore decided to institute an administrative summary proceeding. On December 30, 2004, the summary judgment was to discharge the assistant principal on the grounds of unjustified abandonment.

18. The petitioners allege that the disciplinary sanction imposed to the assistant principal in the administrative proceeding was a whitewash of the sexual assault that the alleged victim suffered, as he was not punished for the "immoral behavior unbecoming his profession," as the alleged victim's mother had requested¹⁰ and that this failure on the part of the administrative system

⁷"1. It is obvious that the deceased, the student Paola Guzmán, was in love with the assistant principal at the high school. 2. There is no conclusive evidence that her feelings were reciprocated by the assistant principal (in other words, he may have or he may not have); the limitations on the present inquiry are such that this matter cannot be determined." Report of October 23, 2003, Lic. Jorge Narea Muñoz, Provincial Supervisor of Education. Office of the Provincial Director of Education. Supervision Division. Attachment of the original petition received at the IACHR on October 2, 2006.

⁸In this sense, the petitioners note that the report suggests an inconsistency between the alleged victim's financial status and the fact that she was carrying 100 dollars. Report of December 22, 2002, Lic. Jorge Narea Muñoz, Provincial Supervisor of Education. Office of the Provincial Director of Education. Supervision Division. Attachment of the original petition received at the IACHR on October 2, 2006.

⁹ The petitioners point out that the offense of unjustified abandonment of post is provided for in Article 120, paragraph 4(b) of the General Regulations Governing the Law on the Teaching Career and the National Teachers Promotions and Ranking System. Original petition received at the IACHR on October 2, 2006, paragraph 50.

¹⁰The petitioners contend that on August 19, 2003, the alleged victim's mother, Petita Albarracín, had asked the Office of the Provincial Director of Education to sanction the assistant principal for "immoral behavior unbecoming his profession," a punishable offense under Article 32, paragraph 4 of the Law on the Teaching Career and the National Teachers Promotions and Ranking System. Original petition received at the IACHR on October 2, 2006, paragraph 49.

was due to gender prejudices. They point out that the alleged victim's mother "has exhausted the administrative proceedings, even though it was neither effective nor adequate to punish the perpetrator of the harassment and sexual abuse."¹¹ They allege further that there was a delay in the administrative case, which lasted over two years, in violation of the law which stipulates that a summary administrative proceeding shall last no more than 15 days from its start to the issuance of the decision.¹²

19. As for the civil case, the petitioners observe that on October 10, 2003, Paola's mother filed a civil complaint against the assistant principal seeking non-pecuniary damages.¹³ They point out that "the civil proceeding has also suffered unwarranted delays"¹⁴ and it was not until June 7, 2005 that the judge ordered the assistant principal to pay 25,000 dollars in damages. The petitioners assert, however, that this decision cannot be executed because the respondent remains a fugitive from justice. They contend that the alleged victim's mother, dissatisfied with the previous judge's ruling, filed an appeal against the decision on May 15, 2006; on June 21, 2006, the appeal went to the Superior Court and is still pending to this day.

20. The petitioners contend that sexual harassment is common in Ecuador's educational institutions¹⁵ and that the case of Paola del Rosario represents the kind of sexual violence that teachers in Ecuador's public schools

¹¹ Original petition received at the IACHR on October 2, 2006, paragraph 77.

¹² The petitioners point out that Article 112 of the Education Law sets a 15-day time period during which the summary proceeding is to be instituted, the inquiry conducted, and teachers who commit crimes against their students punished. Original petition received at the IACHR on October 2, 2006, paragraphs 55 and 79.

¹³ In this sense, the petitioners observe that while it is true that the case in the civil courts is seeking pecuniary reparations for the non-pecuniary damages, this is not the proper remedy to fully redress the harm done. Original petition received at the IACHR on October 2, 2006.

¹⁴ Original petition received at the IACHR on October 2, 2006, paragraph 84.

¹⁵ The petitioners enclose a report prepared by CEPAM-Guayaquil, an NGO and co-petitioner in the present case, which cites a report published by the National Women's Council [Consejo Nacional de las Mujeres] (CONAMU) (Report on the "Program to eradicate sexual offenses within the educational system," 2004). See CEPAM-Guayaquil, "Basic information needed to identify cases that the DESC should refer to the Regional Tribunal of Women," prepared by AB. Mercy López Martínez, February 2005, p. 9. Attachment to the original petition received at the IACHR on October 2, 2006.

commit against female students.¹⁶ They argue that by the conduct of its agents –the assistant principal and school doctor–, Ecuador violated its obligation with regard to the care of Paola del Rosario. They contend that this violation was compounded by the fact that Paola was a child and therefore in need of special protection; thus, by the action of its agents, Ecuador also failed to comply with its international human rights obligations and the rights of the child, protected under Article 19 of the American Convention. They maintain that the Committee on the Rights of the Child has voiced concern over the links between sexual abuse and the suicide rate among adolescents. It has established that States have an obligation to protect adolescents from any form of violence and abuse, including sexual abuse by the teaching staff at schools.

21. The petitioners also point out that the Ecuadorian State has failed to take the necessary legal measures to ensure that children are protected from acts of sexual violence in the public schools. They argue further that the deficient response by the various jurisdictions in this specific case has resulted in the inadequacy of Ecuador’s laws to prevent violence against women.¹⁷ They allege that the State failed to act with the due diligence necessary to prevent, investigate, punish and redress the facts, in violation of Article 7 of the Convention of Belém do Pará. In reference to articles 8 and 25 of the American Convention, the petitioners also allege that this case involves mainly two types of violations: those related to an inadequate legal interpretation of what constitutes sexual offenses, and those related to the domestic proceedings’ delay and inefficiency in the investigation, sanction and redress of the alleged violations.

¹⁶ The petitioners note that according to a study done in Ecuador, 22% of school-age girls report having been the victims of sexual abuse. Shawna Tropp and Mary Ellsberg, “Addressing Violence against Women within the Education Sector”, prepared for the World Bank’s Gender and Development Group, PREM, February 2006, p. 2. The petitioners’ brief of observations, received at the IACHR on February 20, 2008, p. 2.

¹⁷ The petitioners state that the IACHR has previously expressed its concern over the criminalization of sexual offenses and their interpretation in Ecuador, and the impact of that interpretation on the rights of women in Ecuador to live a life free of violence. The petitioners mention in this connection the Commission’s Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, April 24, 1997. Original petition received at the IACHR on October 2, 2006, paragraph 130.

22. The petitioners also allege that the State violated Article 4 of the American Convention by failing to provide Paola del Rosario with prompt medical attention and failing to offer to take her immediately to a hospital, because in its view “it was too late” to help her.¹⁸ They assert that the State violated the right to physical, mental and moral integrity, protected under Article 5 of the American Convention, by virtue of the sexual violence perpetrated against her by a civil servant, while she was in the care of the State. As for the right to personal liberty, protected under Article 7 of the American Convention, the petitioners contend that the right to humane treatment includes, *inter alia*, the right to personal liberty and security, the right to be treated with the respect inherent in the human being, the right to privacy, women’s right to physical autonomy and not to be subjected to unwelcome physical invasions of her body, according to international human rights standards.¹⁹

23. With regard to Article 24 of the American Convention, the petitioners assert that the judicial and administrative behavior and negligence of the State authorities, both in processing the administrative case and in conducting the criminal case, have been discriminatory. Their position is that the State’s failure to exercise due diligence in investigating and punishing the acts of sexual violence serves to reinforce and perpetuate stereotypes that blame women for the violence committed against them, favoring the social impunity of these cases.

B. Position of the State

24. The State contends that the petition is inadmissible because the remedies under domestic law have not been exhausted, namely the criminal case, the internal proceedings to seek reparation and the civil case seeking damages. It asserts that the petitioners want to use the Inter-American Commission “to review the merits of the administrative and criminal

¹⁸ The petitioners allege that the school doctor said that “If Paola had swallowed 11 “diablillos” at 10:30 a.m., it was his opinion that by 2:00 p.m. when she came to the infirmary it was already very late, so he opted to urgently call the family members.” Report of the Office of the Provincial Director of Education, January 23, 2003, attached to the original petition received at the IACHR on October 2, 2006.

¹⁹ The petitioners cite as a source in this regard the Human Rights Committee, General Comment 6: The Right to Life (Article 6), 30/07/82, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN document HRI/GEN/1/rev.1 (1996).

proceedings instituted against the (...) [assistant principal], which cannot be done under 'the fourth instance doctrine' which disqualifies the Inter-American Commission from issuing any pronouncement on matters of substance in domestic proceedings conducted by the organs for the administration of justice in Ecuador."²⁰

25. As for the facts, the State observes that Paola del Rosario was the victim of sexual harassment and statutory rape by the assistant principal, who took advantage of his authority to "harass the child and ultimately forced Guzmán Albarracín, a child, into a sexual act that in the end left her pregnant."²¹

26. As for the case in the criminal justice system, the State contends that after the alleged victim's father filed the criminal complaint and the preliminary investigations were conducted, the prosecutorial examining phase was instituted and the appropriate body issued the order to take the accused into preventive detention (or custody), pursuant to Article 167 of the Code of Criminal Procedure. The State notes that to ensure respect for rights and effective and the responsible exercise of public power, the Guayaquil Superior Court decided to dismiss the accused' appeal and to confirm the order binding the accused over for trial. It contends that this same court amended the charge "because the criminal offense [charged] (...) was not the proper one."²² The court changed the charge to aggravated statutory rape because "there were aggravating circumstances, since the offense led to the child's death."²³

27. Concerning the administrative process, the State contends that the alleged victim's mother brought a complaint against the assistant principal, which she filed with the Office of the Regional Under Secretary for Education, which then referred the matter to the Guayas Office of the Provincial Director

²⁰ Note No. 4-2-277/07 of the Ministry of Foreign Affairs of Ecuador, November 16, 2007.

²¹ Note No. 4-2-277/07 of the Ministry of Foreign Affairs of Ecuador, November 16, 2007.

²² Note No. 4-2-277/07 of the Ministry of Foreign Affairs of Ecuador, November 16, 2007.

²³ Note No. 4-2-277/07 of the Ministry of Foreign Affairs of Ecuador, November 16, 2007.

of Education. There, a Special Subcommittee of Supervisors was formed "to conduct an exhaustive inquiry into the complaint and to be able to institute a summary administrative proceeding against the accused teacher,"²⁴ who, as the law requires, was punished with dismissal.

28. In response to the petitioners' allegation that the exception to the rule requiring exhaustion of domestic remedies should be applied on the grounds that the domestic remedies are neither effective nor suitable, the State cites the jurisprudence of the Inter-American Court to the effect that "[I]t must not be rashly presumed that a State Party to the Convention has failed to comply with its obligation to provide effective domestic remedies."²⁵ The State is therefore asking the Commission to shift the burden of proof and place it on the petitioners instead, since it has already shown that internal remedies are available to address the human rights violations alleged.

29. The State argues that the supposed violation is neither attributable to nor the fault of a State agent, since it is a universally recognized principle that States are only internationally responsible for their own acts or crimes. Thus, it argues, it is not guilty of any action or omission that could compromise its international responsibility, since the acts alleged in the present petition cannot be blamed on or attributed to the State.

30. The State observes that since this was a relationship between private individuals, the Ecuadorian State's only involvement has been to administer justice effectively and efficiently; the records of the proceedings show that the State has abided by the law.

31. For all the foregoing reasons, the State is asking that the Commission declare this petition inadmissible, as it does not satisfy the requirements set forth in articles 46 and 47 of the American Convention. It is therefore requesting that the Commission declares, based on articles 27, 28 and 31 of

²⁴ Note No. 4-2-277/07 of the Ministry of Foreign Affairs of Ecuador, November 16, 2007.

²⁵ In this regard, the State cites the *Velázquez Rodríguez Case*, para. 60. See I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4. Note Nº 4-2-277/07 from the Ministry of Foreign Affairs of Ecuador, dated November 16, 2007.

its Rules of Procedure, that the State has not violated any right protected under the American Convention.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

32. The petitioners have standing under Article 44 of the American Convention to lodge petitions with the Commission. The petition names as alleged victims Paola del Rosario Guzmán Albarracín and her next of kin on whose behalf Ecuador undertook the obligation to respect and ensure the rights enshrined in the American Convention. As to the State, the Commission notes that Ecuador has been a party to the American Convention since December 28, 1977, date on which it deposited its instrument of ratification. The Commission therefore has *ratione personae* competence to examine the petition.

33. The Commission is also competent *ratione temporis* because the obligation to respect and ensure the rights protected in the American Convention was already binding upon the State at the time the events alleged in the petition occurred. Furthermore, the Ecuadorian State deposited its instrument of ratification of the Convention of Belém do Pará on September 15, 1995. The Commission therefore has *ratione temporis* competence to examine allegations related to violations of these international instruments.

34. The Commission has *ratione materiae* competence because the petition claims violations of human rights protected by the American Convention and the Convention of Belém do Pará. The Commission is competent *ratione loci* to consider the petition inasmuch as it alleges violations of rights protected by the American Convention and the Convention of Belém do Pará said to have taken place within the territory of Ecuador, a state party to those treaties.

B. Admissibility requisites

1. Exhaustion of domestic remedies

35. Under Article 46(1)(a) of the American Convention, in order for a petition alleging violations of the American Convention to be admissible, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law.

36. Article 46(2) of the Convention states that the rule requiring 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. As the Inter-American Commission's Rules of Procedure provide, and as confirmed both by the Inter-American Commission and by the Inter-American Court, whenever a State alleges a petitioner's failure to exhaust domestic remedies, it must show that the remedies that have not been exhausted are "adequate," in other words, that the function of those remedies within the domestic legal system is suitable to address an infringement of a legal right.²⁶

38. In the instant case, the State is alleging that the remedies under domestic law have not been pursued and exhausted in accordance with Article 46(1)(a) of the American Convention, since the criminal and civil proceedings

²⁶ I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4, para. 60.

instituted in the domestic courts in connection with the facts alleged in the complaint are still pending. It argues, therefore, that the exception allowed under Article 46(2)(a) of the Convention does not apply. The petitioners, for their part, are invoking the exceptions allowed under Articles 46(2)(a) and (c) on the grounds that effective remedies for due process do not exist and based on the unwarranted delay in rendering a final judgment on the domestic remedies used to assert violation of the victims' rights. They contend that it is because of the unwarranted delay and the negligence on the part of the authorities that they do not yet have a definitive judgment in the criminal case, and there is an imminent risk that the case will go completely unpunished.

39. The Commission's jurisprudence recognizes that whenever a crime is committed that is publicly prosecutable, the State has an obligation to set the criminal law system in motion and to prosecute the case until the end²⁷ and that, in these cases, this is the appropriate avenue to pursue to ascertain the facts, try those responsible, establish the appropriate penalties, and make possible other forms of reparations. The Commission is of the view that the facts alleged by the petitioners in the instant case involve a possible violation of the basic right to humane treatment, by virtue of the alleged rape of a child. Under domestic law, this is an offense that is publicly prosecutable and therefore, it is this process, set in motion by the State itself, which has to be examined for purposes of determining the admissibility of the complaint.

40. The Commission notes in this regard, that the Convention of Belém do Pará affirms that the due diligence obligation has special connotations in cases involving violence against women. This instrument also stipulates that in exercising due diligence in response to these acts of violence, the State must take special account of the particular vulnerability of women to violence and discrimination by reason of being a child, among other risk factors.²⁸

²⁷ See, for example, IACHR, Report No. 94/06, Petition 540-04, Admissibility, Inés Fernández Ortega *et al.*, Mexico, October 21, 2006, para. 23; IACHR, Report No. 93/06, Petition 972-03, Admissibility, Valentina Rosendo Cantú *et al.*, Mexico, October 21, 2006, para. 27; IACHR, Report No. 62/00, Case 11,727, Hernando Osorio Correa, Annual Report of the IACHR 2000, para. 24; IACHR, Report No. 52/97, Case 11,218, Arges Sequeira Mangas, Nicaragua, Annual Report of the IACHR 1997, paragraphs 96 and 97; and IACHR, Report No. 55/97, Case 11,137, Argentina, Annual Report of the IACHR 1997, para. 392

²⁸ Article 9, Convention of Belém do Pará

41. The Commission notes that more than five years have passed since the events in this case occurred, and yet the proceedings have still not produced a definitive resolution of the matter. The petitioners allege that the criminal case has been at a standstill since August 25, 2004, therefore, more than four years, due to the absence of the accused. The Commission observes that the State's only response is to argue that the internal remedies have not been exhausted; however, it provides no information on any measures currently underway or any indication of the other procedural options that the petitioners have available to them.

42. The Commission observes that on the question of the reasonableness of the time that a case takes, the Inter-American Court has established that the right to access to justice is not served merely by conducting domestic proceedings; for victims and their next of kin the right to justice also means that within a reasonable period, every measure necessary will be taken to establish the truth of what happened and to punish those responsible.²⁹

43. The Commission is of the view that the admissibility of the present case cannot be conditional upon the exhaustion of judicial proceedings that have been suspended since August 25, 2004, and that given the period of time that has passed since the facts that prompted the complaint occurred, the Commission considers that the exception provided for in Article 46(2)(c) of the American Convention applies, which is the exception allowed in the case of an unwarranted delay in rendering a final judgment. The rule requiring exhaustion of domestic remedies does not, therefore, apply.

44. Finally, the Commission observes that the exceptions to the rule requiring exhaustion of domestic remedies, provided for in Article 46(2) of the Convention, are closely linked to the determination of possible violations of certain Convention-protected rights, such as judicial guarantees. However,

²⁹ I/A Court H.R., *Case of the Ituango Massacre*. Judgment of July 1, 2006. Series C No. 148, para. 289; *Case of the Pueblo Bello Massacre*, Judgment of January 31, 2006. Series C No. 140, para. 171; *Case of the "Mapiripán Massacre"*. Judgment of September 15, 2005. Series C No. 134, para. 216; *Case of the Serrano Cruz Sisters*. Judgment of March 1, 2005. Series C No. 120, para. 66, and *Case of the 19 Merchants*. Judgment of July 5, 2004. Series C No. 109, para. 188.

Article 46(2) of the Convention, by its nature and purpose, has a content that is independent of and separate from the substantive norms of the Convention. Therefore, the determination as to whether the exceptions to the domestic remedies rule apply to the case in question must be made prior to and separate from the examination of the merits, since it hinges on a standard of assessment different from the one used to establish the violation of Articles 8 and 25 of the Convention. The Commission will examine the factors that prevented the internal remedies from being exhausted when the time comes to issue its report on the merits, so as to determine whether rights recognized in the American Convention have been violated.

2. Timeliness of the petition

45. The American Convention provides that in order for the Commission to be able to admit a petition, the latter must be lodged within six months of the date on which the alleged aggrieved party was notified of the final decision in his case. The IACHR has established that the Article 46(2)(c) exception to the rule requiring exhaustion of domestic remedies applies in the instant case. Article 32 of the Commission's Rules of Procedure provides that in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition is to be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission will consider the date on which the alleged violation of rights occurred and the circumstances of each case.

46. In the instant case, the petition was received on October 2, 2006, the facts that are the subject of the complaint occurred starting in 2002 and the effects in terms of the alleged failure of the administration of justice to produce any results are ongoing at the present time. Therefore, given the context and characteristics of the present case, the Commission finds that the petition was filed within a reasonable period of time and that the admissibility requirement regarding the time period for lodging the complaint is deemed to have been satisfied.

3. Duplication of procedure

47. Nothing in the case file suggests that the subject of the petition is pending in another international proceeding or that it is substantially the same as one previously studied by the Commission or another international body. Thus, the Commission considers that the requirements established in Articles 46(1)(c) and 47(d) of the Convention have been met.

4. Colorable Claim

48. The Commission is of the view that it is not appropriate to determine whether or not the alleged violations took place at this stage of the proceedings. For purposes of admissibility, the Commission must decide if the events can be characterized as possible violations to the American Convention, as stipulated in Article 47(b) of the American Convention. The standard for evaluating these factual requirements is different from the requirement for deciding on the merits of a petition. The IACHR must conduct a *prima facie* evaluation to determine whether the petition establishes grounds for the apparent or potential violation of a right guaranteed by the Convention, but not to establish the existence of a violation.³⁰ Such an evaluation is a summary review that does not prejudice or advance an opinion on the merits. By establishing two distinct phases of admissibility and merits, the Commission's Rules of Procedure reflect this separation between the evaluation to be carried out by the Commission for the purpose of declaring a petition admissible and that required to establish whether a violation has taken place.³¹

49. Given the arguments of fact and of law made by the parties and the nature of the matter before it, the Commission finds that in the instant case, the proper determination is that the petitioners' claims of an alleged violation of the rights to life, to humane treatment, to a fair trial, the rights of the child, to equal protection and the right to judicial protection, could characterize violations of the rights protected under articles 4, 5, 8, 19, 24 and 25 of the American Convention, in combination with Article 1(1) thereof, and Article 7

³⁰ See IACHR, Report No. 128/01, Case 12,367, Herrera and Vargas ("La Nación"), Costa Rica, December 3, 2001, para. 50.

³¹ See IACHR, Report No. 31/03, Case 12,195, Mario Alberto Jara Oñate *et al.*, Chile, March 7, 2003.

of the Convention of Belém do Pará, to the detriment of Paola del Rosario Guzmán Albarracín and her next of kin.

50. The Commission deems that the information presented does not offer sufficient elements to support a possible violation of the right to personal liberty, guaranteed under Article 7 of the American Convention.

51. The Commission does not find these claims to be either baseless or manifestly out of order, and therefore considers that the requirements established by Articles 47(b) and (c) of the American Convention have been met.

V. CONCLUSIONS

52. The Commission concludes that it is competent to examine the petitioners' claims with regard to the alleged violation of articles 4, 5, 8, 19, 24 and 25 of the American Convention, in conjunction with Article 1(1) thereof, and Article 7 of the Convention of Belém do Pará and that the claims are admissible under the requirements set forth in articles 46 and 47 of the American Convention.

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

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present petition admissible with regard to the alleged violations of the rights recognized in articles 4, 5, 8, 19, 24 and 25 of the American Convention, in relation to Article 1(1) thereof, and Article 7 of the Convention of Belém do Pará, to the detriment of Paola del Rosario Guzmán Albarracín and her next of kin.

2. To declare the present petition inadmissible as it pertains to the alleged violations of the right recognized in Article 7 of the American Convention.
3. To notify the Ecuadorian State and the petitioners of this decision.
4. To proceed with the analysis of the merits of the case in question.
5. To publish this decision and include it in the Commission's Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 17th day of October, 2008. (Signed): Paolo G. Carozza, Chairman; Luz Patricia Mejía Guerrero, First Vice Chairwoman; Felipe González, Second Vice Chairman; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, Florentín Meléndez, and Víctor E. Abramovich, members of the Commission.