

REPORT No. 20/12
PETITION 1119-02
ADMISSIBILITY
AURA DE LAS MERCEDES PACHECO BRICEÑO
AND BALBINA FRANCISCA RODRÍGUEZ PACHECO
VENEZUELA
March 20, 2012

I. SUMMARY

1. On May 6, 2002, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition that Mrs. Aura de las Mercedes Pacheco Briceño (hereinafter “the petitioner”) lodged against the Bolivarian Republic of Venezuela (hereinafter “the State”) in which she alleged having been denied justice to redress the medical malpractice committed at the private clinic called La Concepción Maternal-Infant Polyclinic C.A. (hereinafter “the Clinic”) in the city of Barquisimeto in the state of Lara, to the detriment of her daughter, Mrs. Balbina Francisca Rodríguez (hereinafter “the alleged victim” or “Mrs. Balbina Rodríguez”).

2. The petitioner contends that the State is responsible for violation of the rights to life, personal integrity, a fair trial, equal protection of the law and judicial protection, recognized in Articles 4, 5, 8, 24 and 25 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), read in conjunction with the duties to ensure the exercise of the Convention-protected rights and to adopt domestic legislative measures, set forth in Articles 1(1) and 2 thereof. The State, for its part, requested that the Commission declare the petition inadmissible, and indicated that the Public Prosecutor’s Office was still within the legal time frame for delivering the closing statement, at which point the preliminary phase of the proceedings would come to a conclusion.

3. Without prejudging the merits of the petition and after examining the parties’ positions and verifying compliance with the requirements stipulated in Articles 46 and 47 of the American Convention, the Commission decided to declare the petition admissible for purposes of an examination of the claim alleging violation of Articles 5, 8 and 25 of the American Convention, read in conjunction with Articles 1(1) and 2 thereof. It also decided to declare the petition inadmissible with respect to the alleged violation of Articles 4 and 24 of the Convention, to notify the parties and to order publication of the report.

I. PROCEEDING BEFORE THE COMMISSION

4. The IACHR registered the petition as number 1119-02 and, after a preliminary analysis, forwarded the pertinent parts to the State on April 14, 2005, for its observations.¹ On August 17, 2005, the State presented its reply, which was forwarded to the petitioner for her observations. On September 28, 2005, the petitioner submitted her response, which was forwarded to the State for comment.

5. By a communication dated August 8, 2006, the IACHR asked the parties to submit updated information on the matter in question. On October 12 and December 14, 2006, the petitioner supplied updated information, which was in turn forwarded to the State for its observations. On

¹ On November 14, 2002, the IACHR received a petition that the petitioner lodged concerning the very same events described in the present petition. It was registered as 4496-02. On April 14, 2005, the Commission informed the petitioner that petition 4496-02 had been joined with the petition classified as number 1119-02, which concerns the matter at issue here.

January 10, 2007, the State presented its reply, which was forwarded to the petitioner for her information.

6. On July 16, 2007, the petitioner supplied additional information and expressed her interest in seeking a friendly settlement. By a communication dated August 20, 2007, the IACHR forwarded the petitioner's additional information to the State and informed both parties that, pursuant to Article 41(1) of its Rules of Procedure then in force, it had decided to place itself at the disposal of the parties with a view to reaching a friendly settlement in the matter. It gave the petitioner and the State one month in which to present their comments. By a communication received on November 29, 2007, the petitioner reconfirmed her interest in seeking a friendly settlement. She also supplied additional information, which was forwarded to the State for comment.

7. On September 24, 2009, the petitioner again expressed her interest in pursuing a friendly settlement and supplied additional information, which was forwarded to the State for its observations. On December 2, 2009, the State requested an extension on the deadline for filing its response, which the Commission granted. On December 3, 2010 and June 15, 2011, briefs were received from the petitioner containing her comments, which were forwarded to the State for its observations.

II. POSITIONS OF THE PARTIES

A. The petitioner

8. The petitioner alleges that her daughter, Mrs. Balbina Rodríguez, who was 32 at the time of the events in this petition and a practicing surgeon, was allegedly the victim of three episodes of medical malpractice at the La Concepción Maternal Infant Polyclinic, C.A.² She states that the first of these episodes was a cesarean section done on August 13, 1998, during which complications arose because "the placenta did not expel spontaneously" and the physicians proceeded to extract it by "pulling on it, broken and in pieces," which caused "heavy hemorrhaging." Her daughter was in "agonizing pain." The petitioner states that the second episode of malpractice occurred that same day, in the afternoon, when the physicians did a "partial hysterectomy," after which her daughter was taken to the Intensive Care Unit in "very grave condition" as she was "hemorrhaging internally [...] both ureters were ligated and perforated." This necessitated a third operation in the early morning hours of August 14, in which a "resection of the uterine neck was done [...] both ureters were deligated, a urethrotomy was performed by inserting urethral stents, and both hypogastric arteries were ligated."

9. The petitioner alleges that the third episode of malpractice was on August 19, 1998, when the urethral stents that had been inserted were removed, before the "damaged urethral tissue had time to heal." The petitioner states further that, as a consequence of this last episode, Mrs. Balbina had to undergo a fourth operation on August 20, 1998, to insert new urethral stents. However, the urethral tissue "did not completely regenerate itself," necessitating a fifth operation on February 8, 1999, as a result of the "aplasia." During that fifth operation, the ureters were reconstructed, a renal fistula was closed and the bladder was attached to the psoas muscle for the left leg.

10. The petitioner alleges that the episodes described above had permanent consequences for her daughter's daily life. A number of surgeries were needed, as was constant

² The petitioner asserts that these episodes are criminalized as "criminal negligence resulting in grievous personal injury," as provided in Article 422, paragraph 2, in connection with Article 416 of the Venezuelan Penal Code.

medical attention. She points out that Mrs. Balbina Rodríguez “spent almost a year as a complete invalid and was reduced to a wheelchair”; while she recovered her ability to walk, the “terrible physical and psychological aftereffects” she suffered allegedly left her capacity for work permanently diminished.

11. The petitioner states that because of what happened, on January 28, 1999 Mrs. Balbina Rodríguez filed a complaint against Dr. Julio César Zumeta, thereby initiating the criminal case in the domestic courts for the injuries she sustained.³ The petitioner points out that although on June 28, 1999, the Lara State Criminal Court of First Instance issued the order for Dr. Zumeta to stand trial for criminal negligence resulting in grievous personal injuries, when the Organic Code of Criminal Procedure (hereinafter “the COPP”) entered into force in July 1999 the case was later referred back to the Public Prosecutor’s Office, after which, the petitioner alleges, the entire process had to be restarted from the beginning of the investigation, even though it had already be concluded. Thereafter, the petitioner alleges, the case got bogged down in the preliminary phase.⁴

12. The petitioner points that she served as her daughter’s legal representative in an unsuccessful bid to keep the case moving forward in the face of delays that she blames on the authorities in the justice system.⁵ She contends that the Public Prosecutor’s Office allowed time to slip away until criminal prosecution would be time barred; she claims further that the Public Prosecutor’s Office failed to issue the closing statement necessary to wrap up the preliminary phase within a reasonable period of time.⁶ She also alleges that the final outcome of the criminal case hinged on the how quickly the Public Prosecutor’s Office and the judges acted to conduct the proceedings; however, because of an unwarranted delay, the facts allegedly went unpunished and her daughter was denied access to justice.

13. The petitioner observes that the Public Prosecutor’s Office presented its closing statement on October 19, 2001 in the form of an indictment brought against one of the accused physicians for the crime of “criminal negligence resulting in grievous personal injury.” On September 24, 2002, the Seventh Preliminary Proceedings Court agreed to hear the indictment and also dismissed the case against the other three accused physicians. The petitioner states that she challenged this decision by filing an appeal on September 30, 2002. She also asserts that on September 29, 2003, she filed a supervening appeal, since the first appeal she filed had not yet been decided. She contends that no decision was delivered on either appeal, so that on November 18 and December 1, 2003, she filed a petition with the Court of Appeals of the Criminal Judicial Circuit for Metropolitan Caracas (hereinafter “AMC”) seeking a writ of constitutional *amparo* and unspecified precautionary measures. That appeal was decided on December 8, 2003, by the Court of Appeals of the Criminal Judicial Circuit for the AMC, which ordered that the case be sent to the

³ A case was also brought with the Disciplinary Tribunal of the Lara State Medical Association, which ended in a penalty of a “written and public reprimand” against Dr. Julio César Zumeta, by virtue of a decision of the Appeals Court of the Venezuelan Medical Federation on August 28, 2001.

⁴ The petitioner explains that the Code of Criminal Prosecution was the law that regulated criminal procedure at the time the case was instituted and that was supplanted when the COPP entered into force. Under the COPP, the Public Prosecutor’s Office gained exclusive prosecutorial authority.

⁵ She explains that she intervened in the process by filing a criminal complaint against Drs. Julio Zumeta, Grover Castellón, Marlene Mujica and Alexis Manuel Lamus. The Seventh Preliminary Proceedings Court for the Lara State Judicial Circuit agreed to hear her complaint on January 31, 2000.

⁶ She contends that she once petitioned the Office of the Attorney General of the Republic to disqualify the prosecutor assigned to the case. However, her petition was dismissed as out of order and, because it was found to be out of order, Mrs. Balbina Rodríguez was fined pursuant to the Organic Law of the Public Prosecutor’s Office then in force. She alleges that because of that decision, she never petitioned for disqualification of the prosecutors assigned to the case.

AMC Superior Prosecutor, which was to issue a new closing statement regarding all the accused in the case.

14. The petitioner contends that the closing statement was issued on September 21, 2006, in which the Public Prosecutor requested that all charges against the accused be dropped; the Preliminary Proceedings Court so ordered on June 4, 2010. The petitioner states that she appealed that decision, which the higher court vacated on November 22, 2010. However, she reports that as of June 2011, the hearing at which a new Preliminary Proceedings Court would rule on the request for dismissal of the charges was still pending.⁷

15. The petitioner alleges that the various appeals and motions she filed throughout the criminal case were decided belatedly and in the end proved to be ineffective mechanisms for remedying the “acts of negligence” committed and for getting the officers of the court to meet the deadlines and carry out the procedural phases that the law prescribes. She observes that she did more than just appeal the court rulings; faced with the looming threat that justice would be denied, and to avoid criminal action being time barred, on June 19, 2001 she also filed a petition seeking constitutional *amparo* which she alleges was not promptly examined by the competent judicial authority. She contends that on July 9, 2001, she filed a supervening petition seeking constitutional *amparo* with the Administrative Law Superior Court of the Lara State Judicial Circuit, “requesting that the petition of *amparo* not be allowed to languish and that it be referred directly to the competent judge.”⁸

16. She points out that in a decision of May 28, 2003, the Constitutional Chamber of the Supreme Court declared her petition of *amparo* inadmissible. She maintains that although this decision determined that the effect of the actions taken by the petitioner was to toll the statute of limitations for criminal prosecution, under Article 110 of the Venezuelan Penal Code, when the process goes on for a period of time equal to the applicable statute of limitations –which in this case was three years- plus half that period, and cannot be blamed on the accused, then the statute of limitations on criminal prosecution expires. She states that the statute of limitations for criminal prosecution of this crime had expired on August 13, 2006, so that prosecution of the crime was time barred. Hence, any court ruling would “necessarily and for the sake of legal certainty” so rule, which would mean that there would be no way to “get justice” from the domestic courts.

17. The petitioner therefore alleges that since any possibility of prosecuting those responsible for the injuries caused to Mrs Balbina Rodríguez was now precluded, she also lost any possibility of filing a civil suit for damages and injuries since, under Venezuelan law, in order to establish a respondent’s civil liability that respondent must first be found guilty in criminal court.

18. Similarly, the petitioner argues that under the COPP, in cases of this kind the time that the Public Prosecutor has to issue its closing statement wrapping up the preliminary phase is “discretionary”, so she would have had no suitable mechanism to get the Prosecutor’s Office to comply with its exclusive legal mandate for prosecuting crime. The petitioner argues that the Code of Criminal Prosecution provided that “in any case that can be brought *ex officio*, any private party –aggrieved or not- can become a plaintiff before any court with jurisdiction to conduct the respective preliminary criminal investigation.” She contends that the COPP’s entry into force was prejudicial to the alleged victim, as it “denied” her the opportunity to bring a criminal case and move it forward

⁷ By a communication received on June 15, 2011, the petitioner reported that by that point in time, the hearing had been postponed eleven times; the most recent date set for the hearing was June 22, 2011.

⁸ She states that the Court declined jurisdiction in the Constitutional Chamber of the Supreme Court which, in a ruling delivered on January 6, 2002, decided that, as a precautionary measure, the expiration of the statute of limitations would be deferred until such time as the original petition of *amparo* was decided.

when the authorities in the administration of justice failed to act on the case. She contends that the pace of a case depended on how quickly the public prosecutor's office and the judicial authorities acted to conduct the case; she observed that because "there was no provision in the law that would require the public prosecutor's office to bring a criminal case and prosecute it," the alleged victim's right to effective judicial protection had been violated.⁹

19. Finally, she alleges that with this new procedural system, the Public Prosecutor's Office "only had to criminally prosecute" certain cases, which is why she alleges that the equal protection of the law for the case involving the injuries to her daughter had been denied.

B. The State

20. In response to the petitioner's claims, the State contends that the petition must be declared inadmissible. However, it does not offer any concrete arguments to support its position.

21. In its original brief, the State gave an account of the actions taken by the domestic court authorities. It observed that on January 18, 1999, domestic proceedings got underway in the complaint filed by Mrs. Balbina Rodríguez, for the crime of "criminal negligence resulting in grave personal injury." The proceedings began under the Code of Criminal Prosecution then in force but which was later supplanted by the Organic Code of Criminal Procedure. It observed that on July 2, 2005, the Eighth and Thirty-Eighth prosecution units of the Public Prosecutor's Office for the Metropolitan Caracas Judicial Circuit issued the complaint against Drs. Grover Castellón Céspedes, Marlene Ramírez Mujica, Manuel Alfredo Alvarado and Alexis Manuel Lamus, for the crime of "criminal negligence resulting in grievous personal injury" and that the case was brought within the "time period prescribed by law" for the Public Prosecutor's Office to issue its closing statement wrapping up the preliminary phase of the proceedings.

22. It later reported that on September 21, 2006, those prosecutors with the Public Prosecutor's Office had requested that the case against Dr Julio César Zumeta and Dr. Alexis Manuel Lamus be dropped since criminal prosecution "was obviously time-barred." They requested that the case against Dr. Grover Castellón Céspedes, Marlene Ramírez Mujica and Manuel Alfredo Alvarado be dropped inasmuch as they could not be accused of a punishable offense. It stated that the competent authority had not yet issued its decision on the request that the case be dismissed.

III. ANALYSIS OF ADMISSIBILITY

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

23. Under Article 44 of the American Convention the petitioner is entitled, in principle, to lodge a petition with the Commission. The alleged victim named in the petition is an individual whose rights under the American Convention the Venezuelan State undertook to respect and ensure. As for the State, the Bolivarian Republic of Venezuela has been a State party to the American Convention since September 8, 1977, the date on which it deposited its instrument of ratification. Therefore, the Commission has competence *ratione personae* and *ratione temporis* to examine the petition.

24. The IACHR has competence *ratione loci* and *ratione materiae* to examine the petition inasmuch as it alleges violations of human rights established in the American Convention, said to

⁹ The petitioner observes that she filed a challenge seeking partial nullification of the Organic Code of Criminal Procedure with the Constitutional Chamber of the Supreme Court. It was declared inadmissible on January 14, 2004.

have occurred within the territory of the Bolivarian Republic of Venezuela, a State party to the Convention.

B. Other admissibility requirements

1. Exhaustion of domestic remedies

25. For a petition alleging violation of the American Convention to be admissible, its Article 46(1)(a) requires that the remedies under domestic law be pursued and exhausted in accordance with generally recognized principles of international law. Article 46(2) of the Convention provides that the rule requiring exhaustion of local remedies shall not apply when (i) 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; (ii) 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 (iii) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

26. In its initial reply in the instant case, the State wrote that on September 21, 2006 the Public Prosecutor's Office had filed a request asking that the charges against all the accused in the criminal case initiated at the domestic level be dropped, and that the corresponding court authority now had to deliver its decision on that request, which was still pending. The petitioner, for her part, indicated that the Preliminary Proceedings Court had acceded to the request that the case be dropped and that on November 22, 2010, the proceedings were vacated and the case was ordered sent to another court; she claimed that as of June 2011, the hearing at which the court would rule on the request for dismissal had not yet been held.

27. For purposes of this case's admissibility and based on the information available, the Commission observes that the criminal process instituted was a suitable remedy; there is no dispute between the parties in this regard. In the Venezuelan legal system, criminal negligence resulting in grievous personal injury is criminalized in the Penal Code, which requires that if the crime is an offense under public law, it must be prosecuted by the State automatically. The petitioner contends that the statute of limitations expired in the criminal case she brought representing her daughter. During that period, the petitioner filed a number of motions and appeals, all calculated to toll the statute of limitations for criminal prosecution and to correct the slow pace at which the authorities prosecuting the case in the domestic courts were moving.

28. The IACHR observes that the petitioner's arguments on the merits center around the alleged failure to guarantee judicial protection through access to rapid and effective remedies. Specifically, the petitioner is referring to the unwarranted delay in deciding the case involving the grievous personal injury to her daughter resulting from successive episodes of medical malpractice that began on January 28, 1999; she alleges that prosecution of this case was time barred on August 13, 2006, because of the justice system's failure to act. The Commission observes that from the information supplied by the parties, it would appear that as of the date of preparation of this report, no definitive ruling has been delivered on the outcome of that criminal case. The Commission considers that the petitioner's allegation fits the exception allowed under Article 46(2)(c) of the Convention to the rule requiring exhaustion of domestic remedies, which provides that the exception applies when "there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."

29. The Commission also notes that the State has not submitted any information to refute the petitioner's allegations regarding the unwarranted delay in the criminal case in the domestic courts.

30. Therefore, given the characteristics of this case, the length of time that has passed since the events that are the subject of the petition transpired, and as no final decision has as yet been delivered in a criminal case that began back in 1999, the Commission considers that the exception allowed under Article 46(2)(c) of the American Convention also applies, which is the exception allowed for an unwarranted delay in the domestic proceedings; therefore, the rule requiring exhaustion of domestic remedies is not exigible.

31. Invocation of the Article 46(2) exceptions to the rule requiring exhaustion of domestic remedies is closely linked to the determination of possible violations of certain Convention-protected rights, such as the guarantees of access to justice. However, 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. The determination as to whether the exceptions to the requirement for exhaustion of domestic remedies stipulated in Article 46(2) apply to the case must therefore be made prior to and independently of the analysis of the merits, as it hinges on a standard of assessment that is different from the one used to determine whether there has been a violation of Articles 8 and 25 of the Convention.

1. Deadline for Submitting the Petition

32. The American Convention provides that for a petition to be admissible by the Commission, it must have been filed within six months following the date on which the aggrieved party was notified of the final judgment. In the petition *sub examine*, the IACHR has established that the Article 46(2)(c) exception to the rule requiring exhaustion of domestic remedies applies. Article 32 of the Commission's Rules of Procedure provides that in those cases in which the exceptions to the rule requiring exhaustion of domestic remedies apply, the petition is to be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission is to consider the date on which the alleged violation of rights occurred and the circumstances of each case.

33. In the instant case, the events that are the subject of the petition began in August 1998 and the petition was received on May 6, 2002, when the Public Prosecutor's closing statement in the criminal case, which would bring the preliminary phase of the proceedings to a conclusion and is a requirement under Venezuelan law, had not yet been delivered. The case began in July 1999. No decision had been handed down on the petition of *amparo* that the petitioner filed on July 9, 2001 and that the Constitutional Chamber of the Supreme Court took up on January 6, 2002. Therefore, given the circumstances of the case in question, particularly the course of the criminal case in the domestic courts and the arguments alleging an unwarranted delay and the denial of justice, the Inter-American Commission concludes that the petition was lodged within a reasonable period of time. Hence, the requirement stipulated in Article 32(2) of its Rules of Procedure has been satisfied.

2. Duplication of proceedings and international *res judicata*

34. Nothing in the case file suggests that the petition lodged with the Inter-American Commission is currently pending settlement in another international proceeding or that it is substantially the same as another petition already examined by this Commission or another international body, as stipulated in Articles 46(1)(c) and 47(d) of the American Convention,

3. Characterization of the facts alleged

35. Given the elements of fact and of law presented by the parties and the nature of the matter it has under consideration, the Commission finds that in the instant case, a determination must be made as to whether the petitioner's allegations could tend to establish violations of rights protected under Articles 5, 8 and 25 of the American Convention, read in conjunction with Article 1(1) thereof, to the detriment of Mrs. Balbina Rodríguez and her mother, Mrs. Aura de las Mercedes Pacheco Briceño.

36. The Commission also observes that the allegations made by the petitioner concerning the obligation to adopt domestic legislative measures, pursuant to Article 2 of the American Convention, specifically the matter of the provisions of Venezuela's Organic Code of Criminal Procedure that govern the conduct of the Public Prosecutor's Office, require an in-depth analysis because they raise questions pertaining to the scope of the obligation contained in Article 2 of the Convention, in relation to the rights contained in Articles 8(1) and 25 thereof.

37. Finally, the Commission considers that the petitioner has not supplied the basic elements that establish a *prima facie* case for her claims of a potential violation of the rights to life and to equal protection, recognized in Articles 4 and 24 of the American Convention, respectively. The IACHR therefore declares that the petition is inadmissible with respect to those allegations, in keeping with Article 47(b) of the American Convention.

V. CONCLUSIONS

38. The Commission concludes that it is competent to examine the allegations made by the petitioner claiming violation of Articles 5, 8 and 25 of the American Convention, read in conjunction with Articles 1(1) and 2 thereof, and they are admissible under the requirements set forth in Articles 46 and 47 of the American Convention. It also concludes that the claims alleging violation of Articles 4 and 24 of the American Convention are inadmissible.

39. Based on the arguments of fact and of law stated above and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present case admissible with respect to Articles 5, 8 and 25, in relation to Articles 1(1) and 2 of the American Convention.
2. To declare the present case inadmissible with respect to Articles 4 and 24 of the American Convention.
3. To notify the Venezuelan State and the petitioner of this decision.
4. To proceed with the analysis of the merits of this matter.
5. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 20th day of the month of March 2012.
In favor: José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Felipe

González, Second Vice-President, Rodrigo Escobar Gil, Rosa María Ortiz; and Rose-Marie Belle Antoine (dissenting), Members of the Commission.