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REPORT No. 200/19

PETITION 424-09

REPORT ON ADMISSIBILITY

C.M.V.A. AND FAMILY

ECUADOR

Approved electronically by the Commission on December 6, 2019.

Cite as: IACHR, Report No. 200/19. Petition 424-09. Admissibility. C.M.V.A. and family. Ecuador. December 6, 2019.



I. INFORMATION ABOUT THE PETITION

Petitioner:	Jorge Sosa Mesa and Cristóbal Montaña Melville ¹
Alleged victim:	C.M.V.A. ² and family ³
Respondent State:	Ecuador
Rights invoked:	Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 11 (privacy) and 25 (judicial protection) of the American Convention on Human Rights ⁴

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition:	April 6, 2009
Notification of the petition to the State:	September 2, 2016
State's first response:	March 15, 2017
Additional observations from the petitioner:	June 30, 2009; December 28, 2009; August 23, 2010; December 29, 2014; September 30, 2015
Additional observations from the State:	November 24, 2017

III. COMPETENCE

Competence <i>Ratione personae</i> :	Yes
Competence <i>Ratione loci</i> :	Yes
Competence <i>Ratione temporis</i> :	Yes
Competence <i>Ratione materiae</i> :	Yes, American Convention (deposit of instrument made on August 12, 1977); Inter-American Convention to Prevent and Punish Torture (deposit of instrument made on November 9, 1999)

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

Duplication of procedures and International <i>res judicata</i> :	No
Rights declared admissible	Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 11 (privacy), 19 (rights of the child) and 25 (judicial protection) of the American Convention, in accordance with its Article 1.1 (obligation to respect rights); Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, exception set out in Article 46.2.c applicable
Timeliness of the petition:	Yes, in the terms of Section VI

V. FACTS ALLEGED

1. The petitioners allege that on September 19, 2002, Sergeant Vega Sánchez of the National Navy, accompanied by other sailors, pursued CMVA, a 16-year-old boy, and entered his home illegally, claiming that he had stolen some candy from his store. They argue that the sergeant took the alleged victim

¹ In a brief dated September 30, 2015, the petitioners informed the Commission of the death of Mrs. Carmen Yolanda Valencia Araujo, mother of the alleged victim and up to that point petitioner, and of her replacement by Cristóbal Montaña Melvil, stepfather of the alleged victim.

² The alleged victim (hereinafter "C.M.V.A." or "the alleged victim") remains anonymous due to his status as a child.

³ Carmen Yolanda Valencia Araujo, mother; Cristobal Montaña Melvil, step-father; Mercedes Jeaqueline Montaña Valencia, Jahaira Giraldiva Valencia Araujo, Carlos Fernando Valencia Araujo, Alvaro Jesus Montaña Valencia, Nancy Gisella Valencia Araujo, brothers and sisters; Carmen Beatriz Valencia Araujo, niece.

⁴ Hereinafter "the American Convention" or "the Convention".

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

by force, put a black hood over his head, placed him in a private van, and took him to an unknown destination. C.M.V.A. returned home a few hours later, barefoot, and shirtless, with bruises all over his body, and with an abrasion, as if he had been scratched with piece of iron. The alleged victim's mother argues that the sergeant's wife had told her that he wanted to "teach her son a lesson". Subsequently, the alleged victim vomited blood clots and from that day on suffered constant stomach pains requiring a hospital visit. The petitioners allege that the doctors said that the youth had suffered serious organ damage due to the beatings. The alleged victim died on September 9, 2003. The petitioners indicate that the autopsy report stated that the cause of death was "electrolyte imbalance, malnutrition, anemia, and sepsis." They complain of irregularities in the corresponding criminal proceedings that failed to lead to any convictions, so the crimes committed remain in impunity.

2. On September 8, 2003, the alleged victim's stepfather filed a complaint for attempted murder with the Prosecutor's Office of Guayas against Mr. Vega Sánchez. On September 13, the alleged victim's mother amplified the complaint, and on October 13, she filed a private prosecution against Mr. Vega Sánchez with the Second Criminal Court of Guayas, which was admitted on October 22. On September 10, the preliminary investigation was started into the offense of pre-meditated homicide. On September 19, Prosecutor Fernando Yavav Núñez initiated the investigation before the Second Criminal Court of Guayas and requested preventive detention as precautionary measure, which was ordered on September 23. However, on October 21, the Prosecutor requested the withdrawal of the precautionary measure on the ground that it could not be established that the suspect had caused the alleged victim's death⁶. On November 20, 2003, the Prosecutor declared the preliminary investigation concluded and refrained from charging Sergeant Sanchez, on the basis that there were insufficient grounds to indict the suspect⁷, a decision confirmed by the District Attorney of Guayas. On December 24, the Second Criminal Court of Guayas issued a provisional stay order, and revoked the order for preventive detention.⁸

3. On June 16, 2004, C.M.V.A.'s mother filed a nullity motion on the grounds that she had not been duly notified and could therefore not exercise her right of appeal. On October 24, 2005, said Chamber issued a resolution annulling all proceedings since the revocation of the order for preventive detention. On July 13, 2006, the petitioners filed an appeal before the Second Criminal Judge of Guayas. On September 6, the original file was forwarded to the First Chamber of the Superior Court. On October 13, the petitioners filed another nullity motion with this court. On May 3, 2007, the First Criminal Chamber of the Superior Court of Justice of Guayas dismissed the motion, on the grounds there had been no breach of the Oral Accusatory System then in force. As regards the appeal, the court upheld the challenged stay order because no prosecutorial accusation had been filed. Additionally, the court also determined the existence of related violations, and ordered that the background case file be remitted to the Public Prosecutor's Office for an investigation into unlawful entry into a private dwelling, which was initiated on August 7, 2007, by the Second Criminal Court.

4. The petitioners also indicate that on May 3, 2004, the alleged victim's mother filed a complaint with the Ombudsman's Office, which admitted the complaint and informed the Third Criminal Chamber of Guayas that it would oversee that the rules of due process were followed during the trial. By order of June 25, 2004, the Ombudsman's Office ordered the initiation of an investigation file against Sgt. Sánchez and others⁹. On June 5, 2008, the Ombudsman's Office decided to accept the petitioner's complaint and established that the conduct denounced constituted a clear violation of fundamental rights. However, it concluded that Sergeant Vegas Sanchez did not act in his capacity as a member of the National Navy. On June 26, the petitioners filed an appeal for review, which was partially admitted on March 12, 2009. The

⁶ The Prosecutor based his decision on the medical reports on the causes of the alleged victim's death and on the Head of the Naval Human Resources' testimony certifying that the suspect worked as usual in the Naval Hospital at the time when the events occurred.

⁷ In his view the investigation had established that the alleged victim had suffered from five-year pulmonary tuberculosis that could not be a consequence of the beatings; that the beatings had not been proven; and that it was established that the suspect had completed his shift at the Naval Hospital on the day in which the alleged assault on the child occurred.

⁸ The Court concluded that there are not sufficient elements to ascertain the offense and establish the criminal responsibility of the suspect, taking into account the opinion not to indict issued by the Representative of the Public Prosecutor's Office.

⁹ Additionally, in a communication dated November 25, 2005, it informed the justices of the first criminal chamber of Guayas that in its view there had been certain anomalies in the preliminary investigation carried out by Prosecutor Yavar Núñez affecting due process.

Ombudsman's Office upheld the complaint against Sgt. Sanchez, in his role as a State agent, and against other individuals, and found clear evidence that CMVA had been kidnapped, beaten and tortured and that his home had been entered unlawfully.

5. In addition, the petitioners indicate that in 2009 they filed a complaint against the State before the Truth Commission. In May 2010, the Commission published its report, where the case of C.M.V.A. is presented as an act of torture perpetrated by members of the armed forces. Sgt. Vega Sánchez was allegedly held responsible.

6. Additionally, on May 30, 2006, the alleged victim's mother filed a complaint against Prosecutor Yavar Nuñez for the crime of perverting the course of justice¹⁰ for his actions in the criminal proceedings. On June 30, 2006, the District Attorney of Guayas and Galapagos ordered a preliminary investigation and, on November 30, 2006, dismissed the petitioners' complaint and requested it be archived. No more information was provided in this regard.

7. Finally, with respect to the offense of unlawful entry, the alleged victim's mother filed a complaint with the Criminal Prosecutor on August 2, 2007, and on August 6, the preliminary investigation began. However, on December 20, the Public Prosecutor's Office dismissed the complaint because the action was barred by the statute of limitation after more than five years had elapsed since the events, and the Prosecutor refrained from charging the suspect. However, on January 11, 2008, the Public Prosecutor's Office initiated the criminal investigation stage for the offense of unlawful entry, in compliance with the order of the Second Court. On March 18, the petitioners filed a private prosecution against the suspect with the Twentieth Criminal Judge. However, on July 9, the District Attorney declared the action to be time barred, thus ratifying the decision issued by the First Level Prosecutor, which was in turn confirmed by the Twentieth Court on September 1, 2008. On September 3, the petitioner filed an appeal, which was dismissed on February 11, 2009, by the Third Criminal Chamber of the Provincial Court of Justice of Guayas. The case was archived on March 5, 2009.

8. For its part, the State argues a failure to exhaust domestic remedies, since reparation proceedings are pending at the national level in connection with the torture and deprivation of liberty suffered by the alleged victim. The State indicates that his situation was documented in the framework of the Truth Commission, as a case of torture. As for the non-pecuniary reparation measures, it argues that on February 1, 2017, a non-pecuniary reparation agreement was signed by the alleged victim's sister before the Ombudsperson's Office, thereby continuing the integral reparation proceedings with the Ministry of Justice, Human Rights and Worship. Since reparation proceedings are pending in favor of the petitioners, the State requests that the IACHR declare itself incompetent to consider this case. The State also alleges the failure to exhaust domestic remedies in relation to the statute of limitations order raised in the proceedings for unlawful entry of the dwelling house. It indicates that if the petitioners did consider that the statute of limitations harmed their cause, they could have filed an action for damages against the judicial officials who handled the case. Therefore, the petition fails to fulfill the requirements set out in Article 46.1.a of the Convention.

9. In addition, the State alleges that the petition fails to state facts that characterize a violation of Article 4 of the American Convention. It indicates that the alleged victim's death was found to have been caused by pre-existing tuberculosis. The State undertook the appropriate investigation as soon as the petitioners filed a complaint, that is, one year after the alleged attack. These proceedings led to various investigative measures, which found that there were insufficient grounds to indict the suspect. In the same way, the complaint of perverting the course of justice filed against the prosecutor in charge of the case was not favorable to the petitioner, since it was verified from the procedural information that the actions of the public prosecutor were aimed at determining what happened during the proceedings.

¹⁰ She argued that the Prosecutor submitted his opinion not to indict, prior to the 90 day period without exhausting all the steps in the investigation - including a number of procedural steps related to the illness and development of the health crisis as a consequence of the beatings suffered by her son, and he did not request statements from the suspect's family - and without taking into account all the evidence produced in the investigation.

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

10. The Commission observes that the petitioners filed a complaint on September 8, 2003, before the Office of the Prosecutor of Guayas. The Commission also notes that the preliminary investigation was concluded without indictments and that on May 3, 2007, the provisional dismissal of the case was confirmed. The Commission also notes that according to the State the alleged victim's case was documented by the Truth Commission, and that a reparation agreement – covering non-pecuniary reparations - was signed by the alleged victim's sister on February 1, 2017. However, regarding the reparations set out in the Law for the Reparation of Victims, the IACHR has repeatedly observed¹¹ that the said proceedings are not an adequate remedy to the effect of a petition's admissibility in a case such as this, in as much as it fails to provide integral reparation and justice for the victim's family. On the other hand, the Commission observes that, despite inclusion of the alleged victim's case in the Truth Commission's Report, to date there has been no final decision on a conviction against the perpetrators. Therefore, the Commission considers that the exception established in Article 46.2.c. of the Convention applies.

11. In the same manner, the Commission observes that the petition was received on April 6, 2009; the events denounced therein occurred on September 19, 2002, with the death of the alleged victim on September 9, 2003. The dismissal of the case was decided on December 24, 2003, and upheld on May 3, 2007; to date, the events continue in impunity and the effects of the alleged violations are ongoing. Therefore, in view of the context and characteristics of this case, the Commission considers that the petition was filed within a reasonable period of time and that the admissibility requirement regarding timeliness must be considered satisfied.

12. With respect to the allegations relating to the unlawful entry into the dwelling house, the Commission observes that on September 1, 2008, the Twentieth Court decided that the action was time barred. This decision was upheld on February 11, 2009, with the rejection of the petitioners' appeal by the Third Criminal Chamber of the Provincial Court of Justice of Guayas. Therefore, the Commission finds that the petitioners have not duly complied with the requirement of prior exhaustion of domestic remedies in this regard.

VII. ANALYSIS OF COLORABLE CLAIM

13. In view of the factual and legal elements presented by the parties and the nature of the matter brought to its attention, the Commission considers that, if proven, the allegations of torture and kidnapping of the alleged victim, as well as the lack of judicial clarification after 17 years of ongoing proceedings, and the alleged irregularities in the criminal proceedings, could characterize possible violations of Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 11 (privacy) and 25 (judicial protection) of the American Convention, in conjunction with its Article 1.1 (obligation to respect rights) and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. In addition, and in light of the fact that C.M.V.A was a child at the time of the events, there could also be a possible violation of Article 19 (rights of the child) of the Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 7, 8, 11, 19 and 25 of the American Convention, in relation to its Article 1.1, and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture; and

¹¹ IACHR, Report No. 157/17. Admissibility. Carlos Andrade Almeida et. al.. Ecuador. November 30, 2017, para. 22. See also IACHR, Report N° 72/16. Petition 694-06. Admissibility. Onofre Antonio de La Hoz Montero and family. Colombia. December 6, 2016, para. 32.

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 6th day of the month of December, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández, First Vice President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Francisco José Eguiguren, Luis Ernesto Vargas Silva, and Flávia Piovesan, Commissioners.