

OEA/Ser.L/V/II.

Doc. 149

1 September 2019

Original: Spanish

## **REPORT No. 139/19**

### **PETITION 1133-12**

#### **ADMISSIBILITY REPORT**

**CONSTANZA SOLEDAD SÁNCHEZ ASTETE Y OTROS  
CHILE**

Approved by the Commission electronically on September 1, 2019.

**Cite as:** IACHR, Report No. 139/19. Petition 1133-12. Admissibility. Constanza Soledad Sánchez Astete et al. Chile. September 1, 2019.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Carlos Hardy Vergara Wistuba
<b>Alleged victim:</b>	Constanza Soledad Sánchez Astete et al <sup>1</sup>
<b>Respondent State:</b>	Chile <sup>2</sup>
<b>Rights invoked:</b>	Article 4 (right to life), 8 (judicial guarantees), 19 (rights of the child), article 24 (equality before the law) and article 25 (judicial protection) of the American Convention on Human Rights <sup>3</sup> ; and I (Right to life, liberty and personal security), II (Right to equality before law), VI (Right to a family and to protection thereof), XI (Right to the preservation of health and to wellbeing) and XVIII (Right to a fair trial) of the American Declaration of Rights and Duties of Men <sup>4</sup>

**II. PROCEEDINGS BEFORE THE IACHR<sup>5</sup>**

<b>Filing of the petition:</b>	June 8, 2012
<b>Notification of the petition to the State:</b>	May 10, 2016
<b>State's first response:</b>	February 10, 2017
<b>Additional observations from the petitioner:</b>	February 26, 2018

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (deposit of instrument on August 21, 1990)

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

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible</b>	Articles 4 (right to life), 5 (personal integrity), 8 (judicial guarantees), 17 (protection of the family), 19 (rights of the child), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention on Human Rights in relation to article 1.1 (obligation to respect) and 2 (duty to adopt domestic legislation)
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, December 9, 2011
<b>Timeliness of the petition:</b>	Yes, June 8, 2012

**V. SUMMARY OF ALLEGED FACTS**

<sup>1</sup> Ana Verónica Astete Ortiz y Carlos Iván Sánchez Vásquez.

<sup>2</sup> Based on article 17.2.a of the Rules of procedure of the Commission, Commissioner Antonia Urrejola Noguera, a Chilean national, did not participate in the debate or decision of this matter.

<sup>3</sup> Hereinafter the "Convention" or the "American Convention"

<sup>4</sup> Hereinafter "American Declaration".

<sup>5</sup> The observations submitted by each party were duly transmitted to the opposing party.

1. Carlos Hardy Vergara Wistuba (hereinafter “the petitioner”) denounces alleged violations of the human rights of Constanza Soledad Sánchez Astete whose death attributes to medical malpractice of state agents; as well as to the rights of her parents Ana Verónica Astete Ortiz and Carlos Iván Sánchez Vásquez, whom he alleges were denied due process in order to illegitimately deprive them of the compensation that, as he considers, the State owes them for being responsible for the death of their daughter .

2. The petitioner reports that the girl Sánchez Astete was born on March 23, 1998 and entered the Luis Calvo Mackenna public hospital on April 1, 1998 (hereinafter “the hospital”) where she was treated and had surgery for severe heart failure. He indicates that, in the days after the surgery, the girl was transferred to other hospital services after suffering other medical complications such as Hischapsprung's disease, swallowing disorders and Down syndrome. He points out that in August 1998, the girl was in the special treatment unit of the hospital when her parents detected that the girl was suffering from severe pain and an appreciable inflammation at first sight on her right leg, to which the medical team showed no concern and could not explain its cause. He alleges that after a week of unsuccessfully requesting that the girl be treated for the problem in her right leg, on August 18, 1998, she appeared with her leg plastered as a result of a fracture that she suffered in the hospital and whose cause could not be explained by hospital authorities.

3. He indicates that, at the request of the parents, the hospital authorities initiated an administrative summary on September 10, 1998 to determine responsibilities for the fracture. He alleges that, after seven months had elapsed without any results from the hospital's investigation, the parents went to the Comptroller General's Office and requested an investigation over the reason for this delay. He notes that on May 3, 1999, the Comptroller's Office responded that the summary initiated in the hospital remained open. He argues that, at the time of the presentation of his petition, neither the hospital nor the Comptroller's investigations had produced any results after fourteen years.

4. He alleges that, as a result of their complaints against the hospital, the doctors of the special care units pressured the parents of the girl Sánchez Astete to withdraw her from the hospital.<sup>6</sup> He notes that on October 8, 1998, the parents were informed that their daughter was discharged from the hospital and, despite being opposed to it as conditions were far from ideal, they were forced to remove the girl from the hospital, as the hospital gave them no alternative. He indicates that on the next day, October 9, 1998, the girl had to be re-admitted to the emergency department of the same hospital where she remained in a state of extreme gravity until she died due to cardiogenic shock on November 5, 1998.

5. On May 18, 2000, the parents filed a claim for damages for the death of their daughter against the hospital and the Chilean Treasury. On March 13, 2006, the 27th Civil Court of Santiago issued a first instance sentence jointly condemning the defendants to pay the plaintiffs two hundred and fifty million pesos<sup>7</sup> for moral damages resulting from the death of their daughter under the hospital's fault. The court considered that the discharge of the girl was not prudent and that the defendants could not prove that it was justified. The tribunal stressed that she was released to the care of her parents who had no capacity to attend to her well and that they were given “cryptic and unintelligible indications”. In the process, the Chilean Treasury objected that it could not be held responsible for acts of the hospital because it was dependent on the Metropolitan Health Service (hereinafter “SMP), a decentralized entity that by law had its own legal status and its own assets independent from those of the central administration. However, the Court considered that the Treasury was jointly and severally responsible because the SMP belonged to the Ministry of Health and, according to Decree with Force of Law 19.653 of November 17, 2001, the State was responsible for the damages caused by the organs of the administration, including the Ministry of Health and its dependents.

6. Both the hospital and the Treasury appealed the decision of first instance. On June 2, 2006, the Santiago Court of Appeals declared the appeal filed by the Chilean Treasury void as it did not present itself within the established deadline. The petitioner maintains that with this declaration the judgment of first instance reached the degree of *res judicata* in the part referring to the conviction against the treasury. Then, on May 19, 2009, a consultation process was decreed to review the decision issued in the first instance against the Treasury. The petitioner considers that this action was inadmissible and illegal because the consultation is a

<sup>6</sup> He alleged that on September 28, 1998 the parents left a note on the grievances book of the hospital on the pressure they were receiving to take the girl home.

<sup>7</sup> Based on the petitioner this will equal to USD484.983.000 at the moment of filing this claim.

process that occurs when the Treasury is condemned and does not appeal, not in a case in which it appealed and the appeal was declared void. On August 7, 2009, the Court of Appeals issued a decision revoking the decision of first instance and leaving the parents of the girl Sánchez Astete without compensation. The Court of Appeals considered that neither the hospital nor the Treasury had passive legitimacy to be liable for the alleged damages. In the case of the hospital because it did not have legal status or its own assets and instead had to be represented by the SMP who was not formally notified of the lawsuit;<sup>8</sup> and in the case of the Treasury because its responsibility was not compromised by the actions of a decentralized entity with its own personality and assets such as the SMP. Against this decision, the girl's parents filed cassation remedies on the form and on the merits both of which were rejected by the Supreme Court of Justice on December 9, 2011.

7. The petitioner considers that the State has left unpunished a situation of medical malpractice that resulted in the death of a girl and denied compensation to her parents, in violation of the American Convention. It also alleges that the State violated the right to equality before the law because, in the process of compensation, the parties were not treated with equity but instead the Treasury was privileged as a resolution was reviewed and reformed to favor it despite the fact that its appeal had been declared vacant as a result of its breach of the procedural deadlines.<sup>9</sup> It also considers that the duration of 11 years from the filing of the claim for damages until the final judgment of cassation does not conform to the parameters of the reasonable time. It also emphasizes that neither the Court of Appeals of Santiago nor the Supreme Court of Justice analyzed or pronounced themselves on the existence or not of medical negligence, or the responsibility or lack thereof of the State in the death of the girl.

8. The State, for its part, considers that the Commission lacks competence *ratione materiae* to hear the petition and that it must be declared inadmissible on the basis of Article 47 (b) of the American Convention. It claims that the petitioner's goal is for the Commission to act improperly as a fourth instance to review a domestic decision because of the mere fact that it did not give rise to what was requested by the petitioners. It highlights that the petitioner had access to all the resources existing in the legal system of the State and that there were no violations of due process.

## **VI. EXHAUSTION OF LOCAL REMEDIES AND TIMELINESS OF THE PETITION**

9. The petitioner has alleged that the domestic remedies were exhausted with the ruling of the Supreme Court of Justice through which the appeals filed by the petitioner were rejected. The State has not made reference to additional local remedies that have not been exhausted and that could be suitable for the claims of the petitioner to be handled at the domestic level. For these reasons, and given that the aforementioned judgment was issued on December 9, 2011 and the petition filed on June 8, 2012, the Commission concludes that this petition complies with the requirements of article 46.1 (a) and (b) of the American Convention.

## **VII. COLORABLE CLAIM**

10. Regarding the State's allegations over the fourth instance formula, the Commission recognizes that it is not competent to review the rulings issued by national courts that act in the sphere of their jurisdiction and apply due process and judicial guarantees. However, it reiterates that within the framework of its mandate it is competent to declare a petition admissible and to rule on the merits when it refers to internal processes that could violate rights guaranteed by the American Convention.

11. In the present case, the Commission observes that the petitioner's allegations refer to the possible responsibility of the State in the injuries and death of a girl; and a possible violation of the reasonable period of time in an administrative investigation and in a civil compensation process for damages. The Commission considers that these arguments are not manifestly unfounded and require a substantive study

<sup>8</sup> During the process of first instance, the Director of the Hospital warned of this circumstance, but the court considered that this was done outside the legal deadline to take charge of the demand. In the second instance, the petitioner alleged that the possible defect caused by the lack of location to the SMP would be validated because the opposing party did not allege the defect in a timely manner during the first instance.

<sup>9</sup> In the appeal stage, the petitioner also alleged that the second instance decision had ignored the legal provisions for which the State was responsible for the damages caused by the administrative bodies, including the Ministry of Health and its dependents.

because the alleged, if verified as true, could make a colorable claim for violations of articles 4 (life), 5 (personal integrity), 8 (judicial guarantees), 17 (protection of the family), 19 (rights of the child), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention in relation to its articles 1.1. (obligation to respect rights) and 2 (domestic legal effects). The Commission will also examine, at the merits stage, the allegations that a domestic court acted without jurisdiction to revoke a sentence that was unfavorable to the State; as well as whether the domestic determinations regarding the responsibility of the State by act of its decentralized entities contravene the Inter-American standards on international responsibility of the States.<sup>10</sup>

12. Regarding the alleged violations of Article 24 of the American Convention, the Commission considers that the petitioner has not provided arguments or support that would allow it to conclude, even prima facie, its possible violation.

13. With respect to the alleged violations of Articles I, II, VI, XI and XVIII of the American Declaration, the Inter-American Commission has previously established that, once the American Convention enters into force in relation to a State, it and not the Declaration becomes the primary source of law applicable by the Commission, provided that the petition refers to the alleged violation of identical rights in both instruments and is not a situation of continued violation. In the present case, the Commission considers that the alleged violations of the American Declaration do not escape the scope of protection of Articles 4, 5, 8, 17, 24, 25 and 26 of the American Convention. Therefore, the Commission will examine these allegations in the light of the American Convention.

#### **VIII. DECISION**

1. To find the instant petition admissible in relation to Articles 4, 5, 8, 17, 19, 25 and 26 of the American Convention, in accordance with articles 1.1 and 2; and

2. To find the instant petition inadmissible in relation to article 24 of the American Convention; and

3. To notify the parties of the decision; to continue with the analysis on the merits and to publish this decision and to 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 6<sup>th</sup> day of the month of December, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández, First Vice President; Margarete May Macaulay, Francisco José Eguiguren, Luis Ernesto Vargas Silva, and Flávia Piovesan, Commissioners.

<sup>10</sup> See amongst other precedents IACHR, Report No. 142/17. Admissibility, Esperanza Guadalupe Llori Abarca. Ecuador. October 23, 2017, par. 14.