

OEA/Ser.L/V/II.  
Doc. 195  
6 July 2020  
Original:  
Spanish

**REPORT No. 185/20**

**PETITION 1459-14**

REPORT ON ADMISSIBILITY / INADMISSIBILITY

CHILDREN HOW LOST THEIR LIVES AT THE TRAGEDY OF THE  
"ABC NURSERY"  
MEXICO

Approved by the Commission electronically on July 6, 2020

**Cite as:** IACHR, Report No. 185/20, Petition 1459-14. Admissibility. Children how lost their lives at the tragedy of the "ABC Nursery". Mexico. July 6, 2020.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Miguel Agustín Pro Juárez A.C Human Rights Center and others <sup>1</sup>
<b>Alleged victim:</b>	María Magdalena Millán García and others <sup>2</sup>
<b>Respondent State:</b>	México <sup>3</sup>
<b>Rights invoked:</b>	Articles 4 (life), 5 (humane treatment), 8 (fair trial), 19 (rights of the child) and 25 (judicial protection) of the American Convention on Human Rights <sup>4</sup> , in relation to its article 1.1 (obligation to respect the rights )

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

<b>Date of receipt</b>	October 27, 2014
<b>Additional information received at the stage of initial review:</b>	August 11, 2015, June 23, 2017, July 7, 2017 and August 14, 2017
<b>Notification of the petition to the State:</b>	August 28, 2017
<b>State's first response:</b>	March 27, 2018
<b>Additional observations from the State</b>	June 21, 2019
<b>Additional observations from the petitioner</b>	July 20, 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 the instrument of ratification made on March 24, 1981)

**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
---	----

<sup>1</sup> The petitioners are José Francisco García Quintana, Patricia Duarte Franco, Martha Guadalupe García Morales, Manuel Alfredo Rodríguez, Luis Carlos Santos and María Guadalupe Martínez Trujillo, parents of the alleged victims and members of the Citizen Movement for Justice June 5.

<sup>2</sup> The petition was presented in favor of forty-nine alleged victims, individualized in an attached document

<sup>3</sup> Pursuant to Article 17.2.a of the Commission's Regulations, Commissioner Joel Hernández García, a Mexican national, did not participate in the debate or decision on this matter.

<sup>4</sup> Hereinafter "the American Convention" or "the Convention".

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

<b>Rights declared admissible</b>	Articles 4 (life), 5 (humane treatment), 8 (fair trial), 19 (rights of the child) and 25 (judicial protection) of the American Convention on Human Rights in relation to its article 1.1 (obligation to respect the rights ) and Article 2 (Domestic Legal Effects).
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, in the terms of section VI
<b>Timeliness of the petition:</b>	Yes, in the terms of section VI

## V. FACTS ALLEGED

1. The petitioners denounce that on June 5, 2009, at the “ABC Nursery”, in charge of providing childcare services in the city of Hermosillo, Sonora state, by delegation from the Mexican Social Security Institute (hereinafter “the IMSS” ), a fire occurred due to a short circuit in one of the electric coolers in the adjoining warehouse, located in the same building. Petitioners indicate that 49 girls and boys died, and another 70 were injured, as a result of the actions and omissions of the state authorities.

2. Petitioners allege that the IMSS distorted the internal regulations by delegating its obligation to provide childcare services to the “ABC Nursery”. In accordance with the Constitution<sup>6</sup> and the General Education Law<sup>7</sup>, the State has the obligation to provide the aforementioned benefits through nurseries, which are part of the national educational system. Along these lines, they indicate that the Social Security Law<sup>8</sup> establishes that such services will be provided by the IMSS and that, exceptionally, the aforementioned entity may enter into quota reversal or service subrogation agreements with employers that have day-care centers installed in their companies, provided they comply with the legal requirements for it. Petitioners argue that in contravention of this legislation, the IMSS initiated a public bidding system, known as the “community neighborhood” scheme, which allowed private third parties to provide childcare services.

3. The petitioners point out that when implementing the aforementioned “community neighborhood” scheme, the IMSS did not adopt safeguards or supervise childcare facilities to guarantee that the care service is provided in minimum conditions of quality and safety. Only 0.3% met the legal requirements for their operation, and none had regular supervision by the IMSS. Likewise, they allege that such absence of measures caused the nurseries managed by private third parties to maximize the number of children enrolled, by decreasing the specific investment for each child, in order to generate higher profits and offer better discounts to the IMSS to achieve public tender for the service, at the cost of quality in the provision of the service.

4. The petitioner argues that, as a result, on August 6, 2001, the IMSS signed a subrogation agreement with the “ABC Nursery School”, delegating the function of providing child care services to 170 children in a building that was not built for that purpose and it shared the same building with a warehouse used by the Sonora State Government that lacked adequate security measures in relation to fire prevention and electrical appliances. It alludes that the partners and managers of said nursery were public officials of the state of Sonora and their relatives, which would show that in practice the “community neighborhood” scheme did not operate in favor of the members of the community, but for the benefit of people linked to the political class.

<sup>6</sup>Political Constitution of the United Mexican States. Article 123. Everyone has the right to decent and socially useful work; for this purpose, the creation of jobs and the social organization of work will be promoted, in accordance with the law. The Congress of the Union, without contravening the following bases, shall issue labor laws, which shall govern: A. Among the workers, day laborers, domestic employees, artisans and, in a general way, all employment contracts: XXIX. The Social Security Law is of public utility, and it will include disability, old-age, life, involuntary cessation of work, illness and accident, childcare and any other insurance aimed at the protection and welfare of workers, peasants, non-wage earners and other social sectors and their families.

<sup>7</sup>General Education Law of 1993. Article 39.- Initial education, special education and adult education are included in the national educational system.

<sup>8</sup> Social Security Law. Article 213. The Institute may enter into agreements for the reversal of fees or subrogation of services, with employers who have day-care centers installed in their companies or establishments, when they meet the requirements indicated in the relative provisions.

5. Emphasizes that the IMSS did not carry out *ex officio* inspections at the “ABC Nursery” and that the authorities only inspected the facilities of said children’s instance, omitting to review the adjoining warehouse, under the excuse that the review of such space corresponded to the state government. Petitioners argue that since 2001 the Office of Fire Prevention and Civil Security of the municipality of Hermosillo warned that the aforementioned warehouse had a greater risk of suffering a fire, due to the high temperatures in the city and the amount of paper that was stored in said space. Despite this, on October 31, 2003, the IMSS renewed the contract with the “ABC Nursery”, allowing it to increase its capacity to provide services to 190 children, without taking further security measures. Petitioners specify that on the day of the fire, negligence, amongst other irregularities occurred: i) non-compliance with the regulations applicable to emergency exits; ii) lack of updating the health license; iii) absence of renewal of the security opinion by the municipality; iv) lack of a favorable opinion by the firefighters and civil protection; v) inadequate location and operation of smoke detectors; and vi) lack of resistance of the wall that separated the children’s room from the warehouse, in order to avoid the spread of the fire.

6. Refers that on August 6, 2009, the Supreme Court of Justice of the Nation (hereinafter the “SCJN”), within the framework of its constitutional competences<sup>9</sup>, decided to investigate what happened at the “ABC Nursery”, in order to analyze the general system of infancy stays subrogated by the IMSS and inquire about the actions and possible responsibilities of the authorities that may have generated the fire. Petitioners relate that in February 2010 the preliminary report was delivered to the SCJN Ministers, where it was stated that the cause of the tragedy of the “ABC Nursery School” was the generalized disorder that prevailed in the general system of child-friendly stays, where only 0.3% of the surrogacy nurseries met the legal requirements for their operation.

7. The petitioner alleges that on June 16, 2010, in a decision divided from six votes to five, the majority of the members of the SCJN rejected the proposal to declare that there was a general disorder in the awarding of contracts, operation and surveillance of the subrogated child stays, considering that such term could only be used if all the nurseries failed to comply with the regulations. Because of this, an opinion was approved that, although it did not question the concrete findings of the investigation, declared that the highest officials of the IMSS and the state of Sonora were not presumably responsible for what happened, since there was no general disorder at service. The petitioner argues that the Ministers who rejected the initial proposal used unclear and openly arbitrary criteria to support their position.

8. The petitioner also points out that for these facts criminal proceedings were initiated in the common and federal courts, which after eleven years have not clarified the truth or sanctioned those responsible. It indicates that on June 5, 2009, the Sonora State Attorney General’s Office initiated investigations at the local level, and that on June 19, it brought criminal action for the crimes of homicide and wrongful injury against fourteen low-ranking workers or public officials. Specifies that the processes are currently still open and no convictions have yet been imposed.

9. In this line, it is explained that on June 22, 2009 the Attorney General of the state of Sonora sent the preliminary investigation to the Attorney General of the Republic (hereinafter the “PGR”), so that said institution continued to investigate the facts at the federal level. In May 2012 the PGR formally decreed the non-exercise of criminal action against the ex-Director of the IMSS and the ex-Governor of Sonora. Against this, the children’s families filed an amparo lawsuit, which in 2013 declared itself well-founded, indicating that the PGR improperly assessed the available evidence. However, it alleges that such decision did not have concrete results in order to achieve clarification of the truth and the sanction of high officials. Petitioner alleges that to date, only nineteen low-ranking officials have been punished in the federal jurisdiction for the crimes of homicide and wrongful injury, through a second instance sentence of June 9, 2017.

---

<sup>9</sup> The petitioner indicates that at the time of the events, article 97 of the Political Constitution of the United Mexican States provided the following: “The Supreme Court of Justice of the Nation may appoint one or more of its members or a district judge or magistrate circuit, or designate one or more special commissioners, when deemed appropriate or requested by the Federal Executive or one of the Chambers of the Congress of the Union, or the governor of a state, only to find out any fact or facts that constitute a serious violation of any individual guarantee. (...)”.

10. The petitioner claims that the aforementioned processes have been carried out with the aim of minimizing and limiting the responsibilities of the State, omitting to properly investigate the structural factors that the authorities affected. He adds that such investigations were limited from the outset to presuppose that the reason for the fire was the negligence at the individual level of people without command capacity, ruling out in advance lines of investigation related to the actions of state agents and politicians linked to the subrogation of the ABC Nursery, despite the evident participation of public officials in the management of the aforementioned children's stay.

11. Likewise, petitioner maintains that to date the PGR has not determined whether the fire occurred due to poor condition and / or negligence in the care of electrical equipment in the warehouse next to the nursery or if it was provoked. Proof of this is that in 2013, due to the impulse of the children's families, a commencement of an investigation on the possibility that the fire was generated by state officials to destroy documents stored in the warehouse, which allegedly verified the diversion of institutional funds by the then governor of Sonora. It argues that although such an investigation is still ongoing due to the facts, it does not present significant progress.

12. Lastly, the petitioner indicates that the Secretary of the Interior and the IMSS have offered a compensation agreement to the relatives of the children, in order to provide financial compensation for human rights violations, as well as medical-psychological care, acts of commemoration, granting of scholarships, among other measures. It maintains that with this, the State seeks impunity and the lack of clarification of the truth, in order to prevent the case from reaching international instances. In this sense, it explains that by push of the families, on October 24, 2011, the General Law on the Provision of Services for Comprehensive Child Care, Care and Development (also known as the Law of June 5) was enacted, which seeks to guarantee that the provision of child care services protect the rights of children. However, it argues that various measures are still pending to achieve its implementation and that, to date, the "community neighborhood" scheme continues to operate through nurseries that do not meet the legal requirements for its operation.

13. The State, for its part, maintains that the petition is inadmissible since domestic remedies have not been exhausted. It argues that from the moment the fire started, the authorities investigated the event, obtaining the sanction of nineteen officials responsible for both action and omission. Likewise, it states that two investigations are still open, so that domestic jurisdiction at the criminal level would not have been exhausted. It adds that the alleged victims have also not used domestic remedies in order to access compensation or other types of reparations. It specifies that they have at their disposal the Executive Commission for the Care of Victims in order to seek a reparation agreement in accordance with the standards of the inter-American system. Finally, it maintains that the relatives of the children have at their disposal the remedy of indirect protection in order to allege any issue related to the regulation and harmonization of the General Law on the Provision of Services for Child Care, Care and Development.

14. Additionally, the State argues that the facts set forth in the petition do not characterize human rights violations. It explains that the State has fulfilled its obligation to diligently investigate the facts denounced and have made available to the victims reparations in accordance with inter-American standards. Regarding the lack of sanction against high authorities, it argues that the aforementioned amparo action filed by the children's families only resolved that the PGR re-analyze the entire body of evidence in order to safeguard aspects of form, so it has full freedom of jurisdiction to decide on the exercise or not of criminal action against IMSS officials and the state of Sonora, without implying a violation of rights. Likewise, it alleges that the report of the SCJN on the case of the "ABC Nursery School" determined that the "community neighborhood" scheme has constitutional and legal support, so that the petitioner has not presented arguments to demonstrate that the validity of this represented a breach of international obligations. Because of this, it requests that the petition be declared inadmissible based on Article 47 (b) of the American Convention, since it considers that the petitioners intend that the Commission act as a tribunal for the review of domestic decisions.

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

15. The petitioner states that the criminal proceedings carried out for the events exceeded the reasonable period and that, to date, not all the intellectual and material perpetrators have been punished. Because of this, it requests that the exception provided in Article 46.2.c of the American Convention be applied. For its part, the State indicates that domestic remedies have not been exhausted, since criminal investigations are still ongoing for the alleged facts. Likewise, it maintains that the relatives of the children have not requested internally the payment of compensation nor have they used the remedy of amparo to achieve the implementation of the General Law on the Provision of Services for Child Care, Care and Development.

16. In this regard, the Commission recalls that, in situations such as the one raised, that include crimes against life and integrity, the domestic remedies that must be taken into account for the purposes of the admissibility of the petitions are those related to the investigation and punishment of the responsible<sup>10</sup>, so it is not necessary to exhaust an action or request for compensation, since it is not adequate to provide justice to the next of kin. Along these lines, the IACHR has specified that in the procedural regimes in which the victims or their next of kin may have the legitimacy to intervene in criminal proceedings, their exercise is not compulsory but optional, and does not in any way replace state activity since once a crime is prosecuted *ex officio*, the State is the one that has the obligation to promote the criminal process and that, in those cases, this constitutes an ideal way to clarify the facts, judge those responsible, and establish sanctions and corresponding penalties<sup>11</sup>.

17. The Commission observes that, in the instant case, eleven years after the events, the State has not clarified whether the fire was intentionally caused or caused by a technical failure, nor has it established the responsibility of all those involved, among them the senior public officials from different state entities. Therefore, given the characteristics of the petition and the time elapsed since the events in the complaint, the Commission considers that the exception provided for in Article 46.2.c of the American Convention is applicable.

18. In addition, the IACHR observes that the fundamental events denounced in the present petition occurred in 2009; that, as has been outlined in detail in this report, the next of kin of the victims have not stopped seeking all the mechanisms of domestic law to claim justice after the events denounced; and that the alleged impunity for such acts continue until the present. The IACHR concludes that the petition was presented within a reasonable time, in the terms of Article 32.2 of the IACHR Rules of Procedure.

## VII. ANALYSIS OF COLORABLE CLAIM

19. In view of the factual and legal elements presented by the parties and the nature of the matter brought to their attention, the Commission considers that, if proven, the alleged breach of the State duty to prevent and adopt safeguards for the provision of the educational service of child care could have led to the fire that cost the lives of forty-nine children; as well as the alleged lack of a diligent investigation to clarify what happened and punish those responsible, could characterize violations of articles 4 (life), 5 (humane treatment), 8 (fair trial), 19 (rights of children) and 25 (judicial protection) of the American Convention, in relation to its articles 1.1 (obligation to respect rights) and 2 (Domestic legal effects).

## VIII. DECISION

1. To declare this petition admissible in relation to Articles 4, 5, 8, 19, and 25 of the American Convention on Human Rights, in relation to its Articles 1.1 and 2; and

<sup>10</sup> IACHR, Report No. 72/18, Petition 1131-08. Admissibility. Moisés de Jesús Hernández Pinto and family. Guatemala. June 20, 2018, para. 10.

<sup>11</sup> IACHR, Report No. 33/18, Petition 377-08. Admissibility. Amanda Graciela Lace and family. Argentina. May 4, 2018, para. 12

2. Notify the parties of this decision; continue with the analysis of the merits of the matter; and 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 July, 2020.  
(Signed): Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, and Julissa Mantilla Falcón, Commissioners.

**Appendix 1**  
**List of alleged victims**

1. María Magdalena Millán García
2. Andrea Nicole Figueroa
3. Emilia Fraijo Navarro
4. Valeria Muñoz Ramos
5. Sofía Martínez Robles
6. Fátima Sofía Moreno Escalante
7. Dafne Yesenia Blanco Losoya
8. Ruth Nahomi Madrid Pacheco
9. Denisse Alejandra Figueroa Ortiz
10. Lucía Guadalupe Carrillo Campos
11. Jazmín Pamela Tapia Ruiz
12. Camila Fuentes Cervera
13. Ana Paula Acosta Jiménez
14. Monserrat Granados Pérez
15. Pauleth Daniela Coronado Padilla
16. Ariadna Aragón Valenzuela
17. María Fernanda Miranda Hugues
18. Yoselín Valentina Tamayo Trujillo
19. Marian Ximena Hugues Mendoza
20. Nayeli Estefanía González Daniel
21. Ximena Yanes Madrid
22. Yeseli Nahomi Baceli Meza
23. Ian Isaac Martínez Valle
24. Santiago Corona Carranza
25. Axel Abraham Angulo Cázares
26. Javier Ángel Merancio Valdez
27. Andrés Alonso García Duarte
28. Carlos Alán Santos Martínez
29. Martín Raymundo de la Cruz Armenta
30. Julio César Márquez Báez
31. Jesús Julián Valdez Rivera
32. Santiago de Jesús Zavala Lemas
33. Daniel Alberto Gayzueta Cabanillas
34. Xiunelth Emmanuel Rodríguez García
35. Aquiles Dreneth Hernández Márquez
36. Daniel Rafael Navarro Valenzuela
37. Juan Carlos Rodríguez Othón
38. Germán Paúl León Vázquez
39. Bryan Alexander Méndez García
40. Jesús Antonio Chambert López
41. Luis Denzel Durazo López
42. Daher Omar Valenzuela Contreras
43. Jonathan Jesús de los Reyes Luna
44. Emily Guadalupe Ceballos Badilla
45. Juan Israel Fernández Lara
46. Jorge Sebastián Carrillo González
47. Ximena Álvarez Cota
48. Daniela Guadalupe Reyes Carretas
49. Juan Carlos Rascón Holguín

