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REPORT No. 55/23
PETITION 620-18
REPORT ON ADMISSIBILITY

SIGFREDO ANAHUEL HERNANDEZ-PALOMO
AND JOSE FERNANDO HERNANDEZ-PALOMO
UNITED STATES OF AMERICA

Approved electronically by the Commission May 12, 2023.

Cite as: IACHR, Report No. 55/23, Petition 620-18. Admissibility. Sigfredo Anahel Hernandez-Palomo and Jose Fernando Hernandez-Palomo. United States of America. May 12, 2023.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Sigfredo Anahel Hernandez-Palomo
Alleged victims:	Sigfredo Anahel Hernandez-Palomo and Jose Fernando Hernandez-Palomo
Respondent State:	United States of America ¹
Rights invoked:	Articles I (right to life, liberty, and personal security), II (right to equality before the law), VI (the right to a family and to protection thereof), XI (right to preservation of health), and XXVII (right to seek asylum) of the American Declaration on the Rights and Duties of Man ²

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	March 18, 2018
Notification of the petition to the State:	April 28, 2020
State's first response:	November 22, 2021

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 Declaration (ratification of the OAS Charter on June 19, 1951)

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 I (right to life, liberty, and personal security), II (right to equality before the law), and XI (right to preservation of health), of the American Declaration
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in terms of Section VI
Timeliness of the petition:	Yes, in terms of Section VI

V. ALLEGED FACTS

1. The principal claim of the petition is that the State failed to provide emergency medical assistance to Jose Fernando Hernandez-Palomo (hereafter "Fernando") resulting in his death. This occurred after Fernando and his brother Sigfredo Anahel Hernandez-Palomo (hereafter "Sigfredo") entered the United States on foot after fleeing from El Salvador.

2. According to the petition, in March 2014, Fernando and Sigfredo (collectively "the brothers" or "the alleged victims") decided to flee El Salvador after being subjected to persecution by a criminal gang (MS-13). The petition states that both brothers were artists who had been involved in a community education

¹ Hereinafter "the United States," "the U.S." or "the State."

² Hereinafter "the American Declaration" or "the Declaration."

³ The observations submitted by each party were duly transmitted to the opposing party.

program in El Salvador aimed at discouraging young people from joining gangs (by exposing them to the art). According to the petition, these activities provoked members of the MS-13 gang to carry out physical attacks and threats against Fernando and Sigfredo. In this regard, the petition also indicates that Fernando was badly beaten by members of the MS-13 gang after he refused to work as a tattoo artist for the gang.

3. The petition states that after transiting through Mexico, on March 31, 2014, the brothers (together with a group of other migrants) entered the United States and began a journey through the deserts of Brooks County, Texas. According to the petition, undocumented migrants routinely travel by foot through Brooks County's deserts, where temperatures in this area exceed 90 degrees for nearly half of the year, and often soar above 100 degrees during the summer. The petition also indicates that undocumented migrants often take this route via Brooks County's deserts to avoid the Border Patrol checkpoint in Falfurrias, Texas, (a city in Brooks County).

4. According to the petition, several hours into the journey, Fernando became ill from heat exhaustion and struggled to keep walking. He became increasingly ill and after walking for twelve hours, Fernando fell to the ground and was unable to walk. The petition states that Sigfredo at first carried Fernando on his back, and searched for water, medical assistance, or shelter. When these efforts proved unsuccessful, the petition indicates that at about 9:00 p.m., Sigfredo called 911 on his cellphone to request emergency medical assistance for Fernando. According to the petition, during this call to the 911 dispatcher, Sigfredo indicated that he and his brother were in Texas; and that their immigration status was undocumented. The petition indicates that the dispatcher told Sigfredo that his information would be immediately forwarded to the Customs and Border Protection ("the CBP" or "the Border Patrol") which would respond. According to the petition, the 911 dispatcher recorded Sigfredo's coordinates based upon his cell phone location.

5. According to the petition, the Border Patrol did not immediately arrive with assistance, as result of which Sigfredo called 911 several more times. The petition indicates that Sigfredo confirmed that he had not moved his location and repeatedly urged the dispatcher to quickly send help. The petition alleges that in the early morning hours of April 1, 2014, Fernando died; and that a medical examiner's report later attributed his cause of death to dehydration. According to the petition, Border Patrol agents arrived approximately thirteen hours after Sigfredo first sought emergency help. By this time, Fernando had already died.

6. The petition alleges that the failure of the United States to provide emergency medical assistance to Fernando violates multiple rights enshrined in the American Declaration, including the right to life; the right to equality before the law; the right to a family and to protection thereof; the right to the preservation of health and well-being; and the right to seek asylum.

7. In relation to the right to equality, the petition alleges that the State arbitrarily denied emergency aid based to upon the status of the brothers as undocumented migrants. The petition contends that the State treated the brothers differently for purposes of responding to their need for emergency aid because of their status as undocumented migrants, in violation of the right to equality before the law.

8. According to the petition, the State's arbitrary and inadequate response to Sigfredo's request for emergency assistance violated his right to family and protection thereof. In this respect, the petition argues that Article VI of the American Declaration "prohibit[s] arbitrary or illegal interference with family life" and a State's interference "may only be justified where necessary to meet [a] pressing need to protect public order, and where the means are proportional to that end."⁴ The petitioners argue that there was no legitimate reason to deny or delay emergency assistance to undocumented migrants; and that accordingly, the impact of this practice upon Sigfredo, the loss of a beloved member of his family, was not proportional or necessary to a legitimate end.

⁴ The petitioners cite IACHR REPORT No. 81/10 CASE 12.562 Merits Publication Wayne Smith, Hugo Armendariz, et al. United States July 12, 2010, para. 24.

9. The petition alleges that the State's arbitrary denial of emergency aid to Fernando violated his right to the preservation of health and well-being. The petition contends that States cannot deny migrants medical care or otherwise arbitrarily threaten their health simply because they are non-citizens of the State. The petition contends that the State should be held accountable for the inevitable consequence of that arbitrary action: the death of Fernando.

10. The petition argues that State's arbitrary disregard for Fernando's need for emergency medical assistance, which ultimately led to his premature death, violated his right to seek asylum in the United States. According to the petition, although Fernando had several grounds upon which to seek asylum protection because of the persecution he suffered in El Salvador due to his anti-gang community activism and beliefs, the CBP's arbitrary and unreasonable actions made it impossible for him to be heard and to seek permanent safety in the United States.

11. Regarding exhaustion of domestic remedies, the petition argues firstly, that (a) domestic administrative remedies were exhausted; and (b) that further litigation would be futile because U.S. law does not provide adequate and effective remedies for the federal government's arbitrary denial of emergency assistance. Ultimately, the petitioners argue that the petition fulfils the requirement of exhaustion or alternatively, is excused from the requirement of exhaustion of domestic remedies. The petitioner indicates that the petition was filed with the IACHR on March 16, 2018.

12. Regarding administrative remedies, the petition states that on March 29, 2016, the petitioner filed a Form 95 Claim for Damage, Injury, or death with Rio Grande Valley Sector of the CBP, seeking relief under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b) for wrongful death, pain, suffering and related injuries caused by the negligent acts of federal agents acting under the authority of CBP. The petition indicates that on July 17, 2017, the petitioner received a communication from the CBP dismissing the claim.

13. The petition indicates that While the FTCA provides a mechanism for litigation in federal district court after administrative exhaustion, the petitioner claims that he could not avail himself of such litigation because, U.S. law does not provide remedies for the federal government's arbitrary denial of emergency assistance. In this regard, the petition submits firstly, that while the FTCA authorizes suit against officers of the United States for unlawful and negligent conduct, the FTCA incorporates the substantive law of the state where the act or omission occurred, which in petitioner's case is Texas. According to the petition, Texas law confines legal standing (to sue) to the parent, child or spouse of the person who died, but not a brother.

14. Secondly, the petition claims that even if the petitioner had standing to sue, Texas law does not recognize liability for public entities for failure to adequately provide emergency services.⁵ Thirdly, the petition submits that the FTCA maintains its own immunity for official conduct exercised with discretion, even if the discretion was abused or led to an act or omission.⁶

15. The petitioner argues that these limitations make clear that U.S. law and courts are unsuitable for redressing the specific types of violations at issue in petition. Accordingly, the petitioner contends that he is excused under Article 31 of the Commission's Rules of Procedure from further exhaustion of domestic remedies because U.S. law does not provide adequate and effective remedies for these alleged violations.

16. Having regard for the foregoing considerations, the petitioner asserts that the petition was filed within a reasonable time in keeping with Article 32 of the Commission's Rules of Procedure.

⁵ The petition cites Texas Civil Practice & Remedies. Code § 101.062. (which provides immunity from "claim[s] against a public agency that arises from an action of an employee of the public agency or a volunteer under direction of the public agency and that involves providing 9-1-1 service or responding to a 9-1-1 emergency call" unless the action violates "a statute or ordinance applicable to the action").

⁶ The petition asserts that in applying this so-called "discretionary function exception," federal courts have disallowed relief in lawsuits challenging negligent rescue efforts by federal officials. In this regard, the petition cites the federal court decision of *Johnson v. U.S. Dep't of Interior*, 949 F.2d 332, 339 (10th Cir. 1991).

17. The State contend that the petition is inadmissible primarily because of (a) failure to pursue and exhaust domestic remedies; (b) untimely submission of petition; (c) failure to state facts that establish a violation of the American Declaration. Additionally, the State submits that the petition contains claims that are beyond the competence of the Commission *ratione materiae*.

18. According to the State, the petitioner has pursued no judicial remedies with respect to any of the claims in the petition. Regarding the claim of wrongful death (under Article I of the American Declaration), the State acknowledges that the petitioner pursued an administrative claim against the CBP under the FTCA (in March 2016). The State further acknowledges that on July 7, 2017, the CBP denied this administrative claim. However, the State contends that the petitioner was entitled to challenge this decision before a federal court (within six months of being notified of the CBP decision) but failed to do so.

19. The State submits that there is no evidence that the petitioner pursued or exhausted any domestic remedies available to address any of the other claims of violations of rights contained in the American Declaration. The State argues that taken together, to the extent that the petitioner raises claims under Articles I, II, VI, XI, and XXVII of the Declaration, the petition has failed to demonstrate that domestic remedies were properly invoked and exhausted.

20. The State asserts that even if the Commission were to determine that the petitioner has exhausted domestic remedies, the petition should be dismissed as untimely (pursuant to Article 32 (1) of the Commission's Rules of Procedure). In this regard, the State submits that the Commission received the petition on March 16, 2018, which was more than six months after the only decision rendered with respect to the petition (the decision of the CBP of July 7, 2017). Further, the State submits that if petition is considered exempt from the exhaustion requirement, the petitioner has failed to demonstrate that the petition was filed within a reasonable period of time (as required by Article 32(2) of the Commission's Rules of Procedure).

21. For the State, the petition is also inadmissible for failure to state facts that establish a violation of the American Declaration and further, that the claims are manifestly groundless. Regarding the claim under Article I (right to life), the State generally submits that the petition does not state facts that tend to establish that Fernando suffered a violation of his right to life due to acts attributable to the United States. Further, the State asserts that there is no indication from the facts contained in the petition that earlier intervention (i.e., between the time of the first call to Texas authorities and Fernando's death) would have resulted in a different outcome.

22. With regard to the claims made pursuant to Article II (right to equality under the law), the State contends that the petition fails to state facts that tend to establish that the alleged victims suffered from unequal treatment before the law on the basis of race, sex, language, creed or any other factor within the meaning of Article II of the Declaration. Further, the State argues that the petition relies solely on the undocumented status of the alleged victims as the alleged basis for unequal treatment before the law without stating any facts that tend to establish that such status was the basis of the alleged withholding of emergency services. The State submits that the mere fact of undocumented status, without more, is insufficient to substantiate a claim of a violation of Article II of the Declaration.

23. The State rejects the claim that the alleged withholding of medical assistance constitutes a violation of the right to protection of the family. In this regard, the State submits that right to family reflected in Article VI of the American Declaration was not intended to apply to the circumstances of the petition but was instead intended to provide that all persons have the right to procreate and raise a family. For the State, the fact that alleged victims are brothers is not sufficient to state facts that tend to establish that the United States has violated the right to establish a family under Article VI of the Declaration.

24. The State submits that the petition fails to state any facts that demonstrate a violation of the right to preservation of health. According to the State, Article XI of the American Declaration provides that every person "has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources." The State asserts that that Article XI is not an open-ended right encompassing all things related to the concept of

“health.” The State further asserts that the petition has failed to articulate any violation of the right to the preservation of health in the context of “sanitary and social measures” relating to “food, clothing, housing, and medical care. According to the State, the allegation that Federal officials were negligent in the performance of their “first responder duties,” even if substantiated, would clearly fall beyond Article XI of the American Declaration. In this respect, the State argues that the claim is not cognizable under Article XI of the American Declaration because it falls beyond the preservation of health through sanitary and social measures relating to food, clothing, housing, and medical care.

25. The State rejects the claims that the alleged failure to provide emergency aid to Fernando violated his right to seek asylum (pursuant to Article XXVII of the American Declaration). The State notes that while the death of Fernando was tragic, that does not give rise to any facts that tend to establish a violation of the right to seek asylum. The State further submits that the fact that Fernando could not exercise human rights after his death does not mean that the United States violated those rights that he may have subsequently attempted to exercise had he not died.

26. The State submits that claims based on certain provisions of the American Declaration are inadmissible because they are outside of the Commission’s competence *ratione materiae*. As a general observation, the State asserts that the American Declaration is a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States. The State further submits that Article 20 of the Commission’s Statute enumerates the powers of the Commission as they relate to States that are not parties to the American Convention. More particularly, the State submits that Article 20 (a) empowers the Commission to pay particular attention (*vis-à-vis* States not party to the American Convention) to “the human rights referred to in Articles I, II, II, IV, XVIII, XXV, and XXVI of the American Declaration. Based on the foregoing, the State asserts that the petition’s claims under Articles VI, XI, and XXVII of Declaration thus fall beyond the *ratione materiae* competence of the Commission and must be dismissed pursuant to Article 20 of the Commission’s Statute.

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

27. The Commission notes that the parties diverge on the issue of exhaustion of domestic remedies. The State submits that domestic remedies have not been exhausted, whereas petitioner ultimately argues that an exception to the requirement of exhaustion is warranted by the absence of adequate and effective remedies.

28. The IACHR observes that the fundamental claim in the instant case alleges the wrongful death of Fernando resulting from the failure of the State to provide emergency medical aid on timely basis. In this regard, the IACHR has consistently ruled that in cases of serious violations of the rights to life and physical integrity, the adequate domestic remedy that needs to be exhausted is the criminal investigation into the facts, aimed at identifying, prosecuting and punishing the perpetrators of such acts.⁷

29. According to the record, it appears that no such investigation was undertaken by the State. In matters such as the instant one, it is not necessary to exhaust civil action before resorting to the IACHR, since that remedy would not redress the claims made concerning the alleged wrongful death. Consequently, the IACHR concludes that in accordance with the provisions of Article 31.2 (b) of its Rules of Procedure the exception to the exhaustion of domestic remedies applies.

30. The Commission notes that the petition was filed on March 18, 2018, and that this was subsequent to the dismissal of the petitioner’s administrative claim (before the CPB) on July 17, 2017. Having regard for the foregoing, together with the ongoing lack of investigation, the IACHR considers that the filing of

⁷ See, inter alia: IACHR, Admissibility Report No. 181/18, Petition 300-09, Ronald Bullock, United States of America, December 26, 2018, at para. 16; Admissibility Report No. 72/18, Moises de Jesús Hernández Pinto and family, Guatemala, para. 10; Admissibility Report No. 78/16, Almir Muniz Da Silva, Brazil, para. 31; Admissibility Report No. 118/17, Carmen Luz Cuchimba Vallejo et al, Colombia, p. 8; Admissibility Report No. 156/17, Carlos Alfonso Fonseca Murillo, Ecuador, para. 13; Admissibility Report No. 44/19, Gerson Mendonça de Freitas Filho, Brazil, para. 9.

the petition was done within a reasonable time, pursuant to Article 32.2 of the Commission's Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

31. As a preliminary consideration, the IACHR notes that the State contends that the American Declaration does not create legally binding obligations and therefore cannot be "violated" as that term is used in the petition. The State further contends that that in relation to State that are not parties to the American Convention, Article 20 of the Commission's Statute effectively confines the Commission's jurisdiction *ratione materiae* to Articles I, II, II, IV, XVIII, XXV, and XXVI of the American Declaration; and therefore precludes the Commission from considering from the petitioners under Articles VI, XI, and XXVII of the Declaration.

32. According to the long-standing practice and jurisprudence of the inter-American human rights system, however, the American Declaration of the Rights and Duties of Man constitutes a source of international obligation for the United States and other OAS Member States that are not parties to the American Convention on Human Rights. These obligations are considered to flow from the human rights commitments of Member States under the OAS Charter, which Member States have agreed are contained in and defined by the American Declaration, as well as from the customary legal status of the rights protected under many of the Declaration's core provisions, and the Commission is empowered under Articles 18 and 20 of its Statute to receive and evaluate allegations that states have failed to respect these commitments. It is therefore appropriate to characterize a Member State's failure to guarantee the rights under the American Declaration as a violation of its obligations under international human rights law and the Commission rejects the State's contention that the American Declaration does not create legally binding obligations for Member States of the OAS.⁸

33. Accordingly, as regards the claims of the petition under Articles I, II, VI, XI, and XXVII the Commission is competent *ratione materiae* to examine the petition.

34. The Commission notes that the main complaint of the petition is the alleged failure of the State to provide emergency medical assistance to Fernando, resulting in his death. This occurred while Fernando and his brother Sigfredo were traveling through the deserts of Brooks County, Texas, with a view to seeking asylum in the United States.

35. After examining the elements of fact and law presented by the parties, the IACHR considers that the petition is not manifestly unfounded. In this regard, the Commission considers that in relation to Fernando, the lack of investigation into the circumstances that led to his death could characterize violations of Articles I (right to life, liberty, and security of the person); II (the right to equality); and XI (right to the preservation of health) of the American Declaration.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles I, II and XI of the American Declaration; and

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.

⁸ See IACHR, Report No. 57/06, Petition 526-03. Admissibility. Hugo Armendáriz. United States. July 20, 2006, para. 30.

Approved by the Inter-American Commission on Human Rights on the 12th day of the month of May 2023.
(Signed:) Margarete May Macaulay, President; Roberta Clarke (dissident vote), Second Vice President; Joel Hernández García and Julissa Mantilla Falcón, Commissioners.