

REPORT No. 160/11
PETITION 13-08
ADMISSIBILITY
I.V.N.R.
PANAMA
November 2, 2011

I. SUMMARY

1. On January 3, 2008, the Inter-American Commission on Human Rights (hereinafter “the Commission,” “the Inter-American Commission,” or “the IACHR”) received a petition presented by the law firm George & George (hereinafter “the petitioners”), representing I.V.N.R.¹ (hereinafter “the alleged victim”), against the State of Panama (hereinafter “the State,” “the Panamanian State” or “Panama”). The petition alleges the State’s responsibility in that in the year 2002, when the alleged victim was 15 years of age and a secondary-school student, she received a blood transfusion at a public hospital, as a result of which she was infected with the human immunodeficiency virus (HIV).

2. The petitioners expressly allege violations of the rights enshrined in Articles 25.1 (judicial protection) and 17.1 and 17.2 (rights of the family) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”). They also allege abridgments of the rights to life, to social security, and to a fair trial. The State maintains that it has violated no human rights and that the petitioner has inadequately exhausted the remedies offered by domestic jurisdiction.

3. Without prejudging the merits of the case, after analyzing the positions of the parties and in compliance with the requirements set forth in Articles 46 and 47 of the American Convention, the Commission decides to rule the case admissible for the purposes of examining the alleged violation of the rights enshrined in Articles 4, 5, 8, 17, 19, 24, 25 and 26 of the American Convention, in conjunction with Articles 1.1 and 2 thereof. The Commission also decides to notify the parties of this decision, to publish it, and to include it in its Annual Report to the OAS General Assembly.

II. PROCEEDINGS BEFORE THE COMMISSION

4. On January 3, 2008, the Commission received the petition and assigned it the number 13-08. On November 20, 2009, it forwarded the relevant parts of the petition to the State of Panama and requested that it reply within a period of two months, in compliance with the provisions of Article 30.2 of its Rules of Procedure. The State requested an extension on January 18, 2010, which was granted. The State’s reply was received on February 23, 2010, and that communication was duly conveyed to the petitioners.

5. In addition, the IACHR received information submitted by the petitioners on April 19, 2010, July 27, 2010, and February 9, 2011. Those communications were duly forwarded to the State. Additional information was received from the State on June 18, 2010, September 24, 2010, and March 29, 2011, and was forwarded to the petitioners.

¹ The name of the alleged victim has been kept confidential at her request.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

6. The petitioners claim that in 2002, I.V.N.R., a young woman of the age of 15, was infected with HIV at the Dr. Arnulfo Arias Madrid Metropolitan Hospital Complex (hereinafter "the Dr. Arnulfo Arias Hospital"), which belongs to the Panamanian Social Insurance Fund.

7. They report that a number of years later, on February 23, 2005, I.V.N.R., by then a law student and covered by the Panamanian Social Security System, was admitted to the Dr. Arnulfo Arias Hospital with a diagnosis of diffuse bilateral pneumonia; as part of her medical assessment, an HIV test was ordered, which on February 24, 2005, came back as positive. As a result, the hospital's Epidemiological Research Unit began an investigation, which revealed that I.V.N.R. had been hospitalized from January 23 to 25, 2002, at the San Miguel Arcángel Integrated Hospital, with a diagnosis of acute abdominal pain and generalized peritonitis; on that occasion, she had been transferred to the Dr. Arnulfo Arias Hospital, where she received a blood transfusion in February 2002.

8. The petitioners report that according to the investigation, one of the donors whose blood was used for the transfusion was HIV positive. That led to a review of the primary records printed by the laboratory equipment used to screen the donors at the Dr. Arnulfo Arias Hospital's blood bank. They claim that the equipment reported a reaction in the sample corresponding to unit No. 22-623, which was not withdrawn for study and confirmation of the diagnosis as required by the standard operating procedure for handling positive donor tests; it was left available for clinical use, and was used in the blood transfusion given to I.V.N.R. According to the petitioners, this offers conclusive proof of the "inexcusable negligence of the blood bank."

9. According to the petitioners, it has been established that I.V.N.R. was infected at the Dr. Arnulfo Arias Hospital through negligence at the blood bank, which failed to follow the standard operating procedure for dealing with donors who test positive, leaving the contaminated blood available for clinical use and causing the consequences suffered by I.V.N.R.: "a ruined working life as a future legal professional, together with the psychological and emotional impact and the pain and suffering felt by both her and her family."

10. Regarding the exhaustion of the remedies offered by domestic jurisdiction, they report that several domestic remedies were pursued: (1) They first lodged a claim for damages with the Fifteenth Civil Circuit Court of the First Judicial Circuit of Panama, which recused itself from hearing the case on the grounds that the matter came under the jurisdiction of the Third Chamber of the Supreme Court of Justice, according to a judgment of January 12, 2006. (2) In order to secure redress for the damages caused to I.V.N.R., they filed a full-jurisdiction administrative dispute suit against the Social Insurance Fund with the Third Chamber of the Supreme Court of Justice. They claim that the court dismissed the suit, ignoring the request for the exhaustion of governmental channels to be waived on account of the nature and urgency of the case, and that it failed to abide by Article 51 of Law 135 of 1943, the Organic Law of Administrative Jurisdiction, which states that "a resolution declining to admit a suit must indicate the defects it contains and order its return to the interested party for them to be corrected." They hold that the failure to comply with this article of Law 135 constituted a breach of due process. On September 12, 2006, the Third Administrative Chamber of the Supreme Court of Justice upheld the decision to refuse the admission of the dispute suit. (3) They also claim that in a further attempt to secure justice, they initiated administrative dispute proceedings for direct redress against the State and the Social Insurance Fund as a public health institution before the Third Chamber of the Supreme Court of Justice, seeking I.V.N.R.'s indemnification for the physical, emotional, and moral damage inflicted. In a resolution dated August 2, 2007, the Third Chamber of the Supreme Court of Justice decided to not admit this administrative filing for direct redress because of defects in its presentation.

11. They further state that in 2004, once I.V.N.R. had reached adult age, they sought an extrajudicial settlement from the Social Insurance Health Fund, for: (1) specialized treatment, at a private clinic in Panama or, if necessary, abroad, and (2) reasonable economic compensation. They report that

this application was denied on the grounds that the decision lay with the Cabinet. According to the petitioners, this reply was incorrect because the Social Insurance Fund enjoys legal, administrative, and financial autonomy for cases of this kind.

12. They contend that the alleged victim has not received due redress and that the domestic remedies were ineffective in providing her with judicial protection. In light of the above considerations, they hold that the State is responsible for violating the rights enshrined in Articles 25 (judicial protection) and 17.1 and 17.2 (rights of the family) of the American Convention, and for violating the human rights to life, to social security, and to due process.

13. In particular, they contend that the HIV infection affects the alleged victim's right to a "normal life" on account of its emotional and psychological impact, together with the fact that the disease could cost her life. Specifically, they claim that the harm caused by her infection with HIV as a result of the hospital's negligence entails (1) an imminent danger to her life, (2) irreparable harm to her health, (3) restrictions on her ability to marry and start a family, since a marriage license demands a medical certificate indicating the absence of sexually transmitted diseases or contagious infections, (4) economic and social harm, (5) her being left defenseless by the State in that she has no permanent treatment, since her rights as a beneficiary of the Social Insurance Service depend on her being affiliated as a worker.

14. Regarding the alleged violations of the right to judicial protection, they argue that the medical and administrative authorities evaded additional investigations intended to reveal the material truth of what happened, and that the hospital did not inform the Public Prosecution Service of the alleged negligence of the officials in charge of monitoring the contaminated blood in order for the corresponding criminal responsibilities to be established. With regard to the legal proceedings brought domestically, they contend that the courts did not examine the merits of their filings; instead, they invoked legal technicalities to deny the alleged victim's claims.

15. With regard to the rights of the family, they hold that as a result of her infection with HIV by a public agency, the alleged victim's ability to marry and start a biological family has been restricted, because a marriage license requires a medical report indicating she is HIV-free.

16. They state that the alleged victim is affiliated to the Social Insurance System on account of short-term jobs with a ministry and not through a permanent position. Thus, when she stops working and paying into the system, she will no longer receive health care and economic assistance. They further contend that there are no guarantees for timely access to the medicines needed for her treatment, since one of the Social Insurance Fund's chronic problems is a shortage of medicines in the quantities and of the quality required by beneficiaries. Regarding her health care, they report that the alleged victim is receiving the services of a private physician who gives her treatment as a humanitarian gesture, receiving no payment from the Social Insurance Fund; they add that there is no guarantee that such a service will be available to her in the future. Finally, they report that her legal representation before the inter-American system is also being provided as a gesture of solidarity.

B. Position of the State

17. Panama maintains that it has incurred in no human rights violations and that it has provided the alleged victim with medical attention in accordance with the universal principles of social security, and that due process has been assured in processing her legal claims.²

² The State indicates that it has furnished documentation of the alleged victim's status as a covered affiliate of the Social Insurance Fund of Panama. It notes that her status from July 4, 1998, to May 2008 was that of a beneficiary and, as of June 2008, she has active coverage as an employee of the Ministry of Education (a government agency). It also indicates that it has enclosed a certification issued by the head of the Infectious Disease Service, stating that the alleged victim is receiving attention at the Metropolitan Hospital Complex's Infectious Disease Center, where she is subjected to the relevant chemical tests (CD4 and others) every four months; certification that she is responding well to this therapy, as indicated by the clinical files; and confirmation that she is receiving the necessary medicines for her illness on a monthly basis and that her medical consultations take place in the private sector.

18. It states that the event that caused the alleged harm to the alleged victim was the supposed administration to her of a unit of contaminated blood. It notes that I.V.N.R. was admitted to the Dr. Arnulfo Arias Hospital on a referral from the San Miguel Arcángel Integrated Hospital on February 17, 2005.³ Because of her symptoms, Panama states, that hospital's Epidemiological Research Unit began an "epidemiological investigation" because the identified risk factors were related to blood transfusions. It reports that the investigation revealed that the alleged victim received a blood transfusion at the intensive care unit of the Dr. Arnulfo Arias Madrid Metropolitan Hospital Complex during her treatment for a "secondary septic shock caused by a complicated case of appendicitis" in February 2002. On March 1, 2005, the Sanitary Epidemiology Unit asked the complex's blood bank for details on the blood donors used for that transfusion. It reports that it was discovered that of the two donors used for the transfusion, one could not be located and the other was HIV positive.⁴ It states that the positive result for HIV by the donor from whom blood unit 22-623 came suggests that HIV was transmitted through the transfusion of that unit of blood to the alleged victim.

19. After the contagion was diagnosed, Panama states that the obligation of informed treatment was met. It reports that the formal communication was confidential and interdisciplinary and provided the alleged victim with full information, and that it took place on March 23, April 26, and July 25, 2005. Panama adds that this confidentiality is intended to protect individuals and their families from any situation that could lead to their exclusion or marginalization in their social, professional, or cultural lives.

20. Regarding the nature of the event that caused the contagion, the State claims that it was an administrative act: that is, a material activity carried out in the performance of an administrative function, producing legal effects that are independent of the will of the State. Consequently, direct responsibility cannot be assigned to the public agencies at the level of personal fault.

21. Panama claims that the petitioners failed to duly exhaust the available domestic remedies. It reports that the Fifteenth Civil Court of the First Judicial Circuit of Panama rejected the first filing before the regular civil courts, and that subsequently statutory limitations applied to the administrative jurisdiction, in accordance with the domestic laws governing the grounds for peremptory exceptions.⁵ It adds that the alleged victim's counsel, in addition to a lack of timeliness in filing the administrative dispute suit,⁶ did not meet the procedural requirement of first exhausting governmental channels, as required by Article 200 of Law 38; as a result, the suit was ruled inadmissible by the first- and second-instance decisions of March 2, 2006, and September 12, 2006, respectively.⁷ It adds that in addition to the expiration of the substantive material law on which a claim is based, the right to bring an action under the administrative dispute jurisdiction may also expire under the terms of Article 27 of Law 33, which provides that "actions seeking redress for abridgments of subjective rights expire, except as otherwise provided for by law, two months after the publication, notification, or execution of the action, fact, or administrative operation that the filing challenges." It notes that according to the Civil Code, the act of notification on which the expiration deadline is based is the date "on which the injured party learned

³ Panama states that her medical record upon admission indicated "probable etiology" since February 4, 2005.

⁴ Panama notes that because of the positive result, a review of the records of the Dr. Arnulfo Arias Hospital's blood bank was carried out and that the sample from Unit 22-623 was found to be "reactive." That sample, according to the records of the intensive care unit, was given to the alleged victim in a transfusion on January 26, 2002, at 8:20 p.m.

⁵ The State also notes that the alleged victim's lawyer brought that action incorrectly, since at the time the alleged victim was already of adult age.

⁶ It explains that the action had to be brought within two months of the action administrative or operation challenged by the complaint, pursuant to Articles 42.B and 43.A of Law No. 33 of 1946.

⁷ The State notes that an administrative dispute action is a suit brought against agencies of the State and other public bodies; that it is an action involving extracontractual responsibility for alleged administrative actions, omissions, or operations; and that it is a direct action, in that all is required is for the petition's request to be accredited within the deadline set by law, since financial redress cannot be requested or granted directly by the administration without a prior jurisdictional declaration of responsibility given by an administrative venue.

of it," which in the case at hand took place on March 23, 2005. It adds that statutory limitations were triggered on March 23, 2006.⁸

22. Furthermore, Panama states that the Social Insurance Fund is an agency of public law that chiefly performs administrative functions and is governed by the provisions of public law, and which does not have the direct authority to negotiate extrajudicially any benefit or payment other than through the procedure for the authorization of complex acts at the request of an interested party.

23. Regarding the right to health and to life, the State claims that the alleged victim was at all times provided with medical services like any other institutional patient, which is a legal obligation of the Social Insurance Fund, with no privileges or stigma but on a basis of equality. Regarding the right to a fair trial and to judicial protection, Panama contends that the alleged victim's legal representative was afforded unhindered access to the legal actions he deemed suitable for securing redress for the "transfusion accident," and that they were discharged within a reasonable time. It states that if favorable results were not obtained, that was due to irresolvable deficiencies in the times and forms in which he lodged those remedies with the domestic courts. Regarding the rights of the family, Panama claims it pursues no practices that undermine the protection of the family.

24. In its note of March 29, 2011, the State insists that "all measures of reparation have been pursued and adopted for the victim of the adverse health incident that caused her complaint," and adds that "hemotherapeutic procedures involve vulnerabilities and opportunities for risk that make it impossible to guarantee the full certainty and safety of contamination-free products in the process."

⁸ The State notes that in October 2005, the alleged victim's representative sought an extrajudicial arrangement, but that this did not prosper.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

25. The petitioners are in principle entitled, under Article 44 of the American Convention, to lodge complaints with the IACHR. The petition names, as its alleged victim, an individual person with respect to whom the State had assumed the commitment of respecting and ensuring the rights enshrined in the American Convention. With reference to the State, the Commission notes that Panama has been a state party to the American Convention since June 22, 1978, when it deposited its instrument of ratification. The Commission therefore has competence *ratione personae* to examine the petition.

26. The Commission also has competence *ratione loci* to hear this petition, since it alleges violations of rights protected by the American Convention occurring within the territory of a state party thereto.

27. The Commission has competence *ratione temporis* since the obligation of respecting and ensuring the rights protected by the American Convention was already in force for the State of Panama on the date on which the incidents described in the petition allegedly occurred. Finally, the Commission has competence *ratione materiae* since the petition describes possible violations of human rights that are protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

28. Article 46.1.a of the American Convention provides that for a petition submitted to the Inter-American Commission in accordance with Article 44 of the Convention to be admitted, remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. That requirement is intended to facilitate the domestic authorities' examination of the alleged violation of a protected right and, if appropriate, to enable them to resolve it before it is brought before an international venue. Thus, Article 46.2 stipulates that the requirement need not be observed when domestic legislation does not afford due process of law for the protection of the right in question, if the alleged victim was denied access to the remedies offered by domestic law, or if there was an unwarranted delay in issuing judgment on those remedies.

29. In the case at hand, the State maintains that the petitioners inadequately exhausted the remedies offered by domestic jurisdiction. In contrast, the petitioners claim that they pursued the remedies offered by domestic jurisdiction in order to secure specialized medical care and financial compensation for the alleged victim, but their claims received no favorable results. In order to determine if the Convention's requirement has been met, the claim submitted to the IACHR must be examined to analyze whether suitable and effective remedies for resolving the alleged situation were lodged or whether there were obstacles to their exhaustion. The petitioners' claim is related to the alleged responsibility of the State in the purported negligent actions of its medical services, which caused the alleged victim to become infected with HIV and to suffer extensive consequences in her life and health, as well as other factors.

30. To analyze compliance with this requirement, the suitable and effective remedy that should have been exhausted must be identified. On this point, the Commission notes the parties' claims regarding the suits pursued domestically, including a claim for damages with the Fifteenth Civil Circuit Court of the First Judicial Circuit of Panama, a full-jurisdiction administrative dispute suit against the Social Insurance Fund with the Third Chamber of the Supreme Court of Justice, administrative dispute proceedings for direct redress against the State and the Social Insurance Fund as a public health institution before the Third Chamber of the Supreme Court of Justice, and an attempt to reach an extrajudicial settlement from the Social Insurance Health Fund for (1) specialized treatment, at a private clinic in Panama or, if necessary, abroad, and (2) reasonable economic compensation.

31. However, the Commission believes that once the Dr. Arnulfo Arias Hospital discovered that I.V.N.R. had contracted HIV allegedly as the result of a contaminated transfusion, the State should have initiated an *ex officio* investigation to clarify the suspected facts and any possible criminal, disciplinary, and/or administrative responsibilities. That obligation was in place for the State, both as regards the situation of the alleged victim and as regards the State's continuing role in the supervision and oversight of procedures carried out in health centers to ensure the safety of transfusions.

32. In the case at hand, the Commission notes that the State's authorities have not begun criminal, disciplinary, and/or administrative investigations to clear up the incident and establish responsibilities, in spite of the evidence indicating that a unit of blood infected with HIV was transfused into I.V.N.R., while she was still a child, in contravention of the standard operating procedure for managing donors who test positive.

33. In conclusion, the Commission believes that the prior exhaustion of domestic remedies requirement in Article 46.1 of the Convention has been satisfied.

2. Timeliness of the petition

34. Article 46.1.b of the Convention states that for a petition to be admissible, it must be lodged within a period of six months following the date on which the complainant was notified of the final judgment at the national level.

35. In the case at hand the Commission notes that the judgment of the Third Chamber of the Supreme Court of Justice that decided the administrative dispute proceedings for direct redress at the second instance was issued on August 2, 2007, and that the original petition was received at the Executive Secretariat of the IACHR on January 3, 2008; consequently, and regardless of the date on which notice thereof was served, the Commission concludes that the petition meets the requirement established in Article 46.1.b of the American Convention in that it was filed prior to the expiry of the six-month deadline.

3. Duplication and international *res judicata*

36. Nothing in the case file indicates that the substance of the petition is pending in any other international settlement proceeding or that it is substantially the same as any other petition already examined by this Commission or another international body. Hence, the requirements set forth in Articles 46.1.c and 47.d of the Convention have been met.

4. Colorable claim

37. The Commission believes that at this stage in the procedure it is not appropriate to rule on whether or not the purported violations of the alleged victim's rights actually took place. For the purposes of admissibility, the IACHR must at this time determine solely whether the petition describes facts that, if proven, could tend to establish violations of the American Convention, as provided by Article 47.b thereof, and whether the petition is "manifestly groundless" or "obviously out of order," as indicated in section (c) of that same article. The level of conviction regarding those standards is different from that which applies in deciding on the merits of a complaint. The Commission has to make a *prima facie* assessment and determine whether the petition tends to establish the potential or apparent violation of a right guaranteed by the Convention, not to actually establish such a violation.⁹ At this stage, what is called for is a summary analysis that implies no prejudgment or advance opinion on the merits. The Rules of Procedure of the Inter-American Commission, by establishing separate phases for admissibility and merits, reflects that distinction between the evaluation the Inter-American Commission is to conduct in

⁹ See: IACHR, Report No. 128/01, Case 12.367, *Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser of La Nación newspaper* (Costa Rica), December 3, 2001, para. 50; Report No. 4/04, Petition 12.324, *Rubén Luis Godoy* (Argentina), February 24, 2004, para. 43; Report No. 32/07, Petition 429-05, *Juan Patricio Marileo Saravia and Others* (Chile), April 23, 2007, para. 54.

order to rule a petition admissible and the examination needed to determine whether a violation for which the State is responsible was committed.¹⁰

38. Neither the American Convention nor the IACHR Rules of Procedure require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. It is for the Commission, based on the system's jurisprudence, to determine in its admissibility report which provisions of the relevant Inter-American instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements.

39. Thus, the IACHR believes the alleged facts – that I.V.N.R. was infected with HIV in the year 2002 at the age of 15 years because of a failure to adequately monitor a unit of blood that she received in a transfusion at a public hospital, and that later the necessary benefits of social security judicial protection were not restored and upheld with respect to her – if proven, could tend to establish violations of the rights protected by Articles 4, 8, 17, and 25 of the American Convention, in conjunction with Article 1.1 and 2 thereof.

40. Moreover, bearing in mind that the alleged victim was still a child when she was infected, the IACHR finds that under the special protection duty of the States regarding children, the facts could tend to establish a violation of Article 19 of the American Convention, in conjunction with Article 1.1 thereof.

41. Likewise, given the alleged lack of appropriate medical treatment, the resulting permanent physical, emotional, and moral effects caused by the contagion, for both the alleged victim and her family, the IACHR finds under that same principle that the facts could tend to establish a violation of Article 5 of the American Convention, in conjunction with Article 1.1 thereof. In addition, taking into account the stereotypes and stigma associated with the disease in question, the IACHR will analyze, at the merits stage, the claims in the light of Articles 24 and 26 of the American Convention, in conjunction with Articles 1.1 and 2 thereof.

V. CONCLUSIONS

42. The Commission concludes that it is competent to examine the merits of this case and that the petition is admissible under Articles 46 and 47 of the American Convention; it therefore decides to continue with the analysis of the merits regarding the alleged violation of Articles 4, 5, 8, 17, 19, 24, 25 and 26 of the American Convention, in conjunction with Articles 1.1 and 2 thereof.

43. Based on the foregoing considerations of fact and law,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To rule this petition admissible as regards the alleged violation of the rights enshrined in Articles 4, 5, 8, 17, 19, 24, 25 and 26 of the American Convention, in conjunction with Articles 1.1 and 2 thereof.
2. To notify the parties of this decision.
3. To publish this decision and to include it in its Annual Report to the OAS General Assembly.

¹⁰ See: IACHR, Report No. 31/03, Case 12.195, *Mario Alberto Jara Oñate and Others* (Chile), March 7, 2003, para. 41; Report No. 4/04, Petition 12.324, *Rubén Luis Godoy* (Argentina), February 24, 2004, para. 43; Petition 429-05, *Juan Patricio Marileo Saravia and Others* (Chile), April 23, 2007, para. 54; Petition 581-05, *Victor Manuel Ancalaf Llaupe* (Chile), May 2, 2007, para. 46.

Done and signed in the city of Washington, D.C., on the 2nd day of the month of November, 2011.
(Signed): Dinah Shelton, President; José de Jesús Orozco Henríquez, First Vice-President; Rodrigo Escobar Gil, Second Vice-President; Paulo Sérgio Pinheiro, Felipe González, Luz Patricia Mejía Guerrero, and María Silvia Guillén, Commissioners.