

**REPORT No. 10/12**  
PETITION 341-01  
ADMISSIBILITY  
MÁRCIO MANOEL FRAGA and NANCY VICTOR DA SILVA (*PRECATÓRIOS*)  
BRAZIL  
March 20, 2012

**I. SUMMARY**

1. On May 25, 2001, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission", or "the IACHR") received a petition presented by Nancy Victor da Silva ("the petitioner") requesting that the IACHR clarify the reasons for the death of Márcio Manoel Fraga ("the alleged victim"), the petitioner's son, which occurred on March 27, 1999, in the "Fábio Soares Maciel" Prison Hospital in Rio de Janeiro. The petitioner also denounced before the IACHR the failure to fulfill a final judicial decision in the context of a civil lawsuit for the death of the alleged victim. According to the allegations, the state of Rio de Janeiro did not pay the compensation awarded by this judgment, due to the fact that payment is linked to a judicial executory writ (*precatório*). The petitioner does not refer to specific articles or provisions of the American Convention on Human Rights ("American Convention").

2. The State argues that the alleged victim's death in the prison hospital was due to natural causes, since the autopsy revealed the cause of death to be bronchial pneumonia. Brazil also alleges that the petitioner filed a civil compensation suit against Rio de Janeiro on January 29, 2002, and that this action was ruled in her favor based on the objective liability of the State, and the court ordered the State to pay the petitioner the sum of R\$49,837.90 (forty nine thousand, eight hundred and thirty seven *reais*, and ninety cents), for non-material damages. The State adds that the corresponding *precatório* was issued in favor of the petitioner in 2009, in accordance with domestic law, and has not been paid up until now due to the fact that the Constitution of Brazil lays down an order of priority for the payment of such judicial writs. Based on the foregoing, the State requests that the IACHR close the record of this petition.

3. Without prejudging the merits of the complaint, after examining the position of the parties and in fulfillment of the requirements set out in Articles 46 and 47 of the American Convention, the IACHR decides to declare the case partially admissible for the purpose of examining the alleged violation of the rights enshrined in Articles 8, 21, and 25 of the American Convention, in conjunction with Articles 1.1 and 2 of the same treaty. On the other hand, the IACHR declares inadmissible the allegations regarding the alleged victim's treatment and the blows allegedly suffered at the hands of the military police of Rio de Janeiro during his arrest on February 11, 1999, because the petitioner has not filed or exhausted the corresponding domestic remedies; and because the petition does not state facts that tend to establish a possible violation of the rights guaranteed by the American Convention, in accordance with Article 47.b of the same international instrument. As a result, the Inter-American Commission decides to notify this decision to the parties, publish it and include it in its Annual Report before the General Assembly of the OAS.

**II. PROCEEDINGS BEFORE THE IACHR**

4. The petition was received on May 25, 2001. On June 4, 2001, the IACHR sent the complaint to the State for its observations. In view of the State's failure to respond, on January 14, 2009, the Inter-American Commission repeated its earlier request for information from the State, and requested that the petitioner present up-to-date information, specifically on the requirements for admissibility of the petition.

5. The State responded to the petition on July 21, 2009. The petitioner sent additional information on the following dates: October 27, 2009, March 23, 2010, and April 29, 2010. These communications were duly sent to the State. For its part, the State sent additional information on the following dates: June 18, 2010, July 14, 2010, and December 15, 2010. These communications were duly sent to the petitioner.

### III. POSITION OF THE PARTIES

#### A. Position of the petitioner

6. The petitioner turned to the Inter-American Commission in order to clarify the cause of death of the alleged victim, her 22-year-old son. The petitioner maintains that the alleged victim was beaten by military police of the state of Rio de Janeiro during his arrest *in flagrante delicto*, on February 11, 1999. Due to the above, she alleges that the victim was detained at the 14th Police District with a fever, sore throat and pain in the genital region. The petitioner adds that approximately on March 19, 1999, the alleged victim was transferred to the "Fábio Soares Maciel" prison hospital due to his health problems and that he died at said hospital on March 27, 1999.

7. The petitioner also maintains that she prevailed in a civil compensation action against the state of Rio de Janeiro, by reason of the alleged victim's death while in custody of the State. However, the petitioner points out that she has not received the respective compensation, due to the fact that this payment is linked to a judicial executory writ (*precatório*).

#### B. Position of the State

8. The State indicates that according to the autopsy performed, the alleged victim's death in the prison hospital occurred due to bronchial pneumonia, i.e., from natural causes. Brazil adds that on January 29, 2002, the petitioner filed a civil compensation claim against Rio de Janeiro (Civil Action No. 2002.001.021529-6); and that said action was ruled in her favor and the State found liable to pay her the sum of R\$ 49,837.90 (forty nine thousand, eight hundred and thirty seven *reais*, and ninety cents), for non-material damages.

9. The State indicates that the compensation claim filed by the petitioner has already acquired the status of *res judicata*. It also points out that this decision was based on the objective liability of the State, due to the fact that the alleged victim was under its custody when his death occurred due to bronchial pneumonia. The State also adds that the alleged victim did not complain of any mistreatment during his imprisonment on February 11, 1999; and the examination of Mr. Fraga after his imprisonment did not show any signs of beatings, mistreatment or torture.

10. The State also observes that in 2009 the corresponding *precatório* was issued in favor of the petitioner, in accordance with domestic law, and that it has not been paid to date because the Constitution of Brazil lays down an order of priority for the payment of such judicial writs. Based on the foregoing, the State requests that the IACHR close the record of this petition.

### IV. ANALISYS ON COMPETENCE AND ADMISSIBILITY

#### A. Competence

11. In principle, the petitioner is authorized under Article 44 of the American Convention to lodge a claim before the Inter-American Commission. The alleged victim referred to in the petition, is an individual person with respect to whom the State of Brazil has undertaken to respect and ensure the rights enshrined in the American Convention. As far as the State is concerned, the IACHR notes that Brazil has been a State party to the American Convention since September 25, 1992, the date on which it deposited its ratification instrument. The Inter-American Commission therefore has competence *ratione personae* to examine the petition. The IACHR also has competence *ratione loci* to take up the petition insofar as it claims violations of rights protected in the American Convention that allegedly occurred within the territory of Brazil, a State party to that treaty.

12. Regarding jurisdiction *ratione temporis*, the Inter-American Commission notes that the petitioner refers in the petition to events starting on February 11, 1999, when the obligation to respect and ensure the rights protected in the American Convention were already in effect for the State. Finally, the

IACHR has competence *ratione materiae*, because the petition claims possible violations of rights protected by the American Convention.

## B. Exhaustion of Domestic Remedies

13. Article 46.1.a of the American Convention requires the prior exhaustion of remedies available in the domestic jurisdiction in accordance with generally recognized principles of international law in order for the IACHR to admit complaints. For its part, Article 46.2 of the American Convention provides that the requirement of prior exhaustion of domestic remedies is not applicable when: (i) the domestic law of the State in question does not provide legal due process for the right or rights that have allegedly been violated; (ii) when the one whose rights were allegedly harmed has not had access to domestic remedies or has been impeded from exhausting them; (iii) or when there has been an unwarranted delay in the decision on the aforementioned remedies.

14. The IACHR requested from the petitioner specific information on the exhaustion of domestic remedies on March 31, 2010, April 20, 2010 and May 17, 2010. Specifically, the IACHR requested information about whether there existed a criminal investigation relating to the treatment of the alleged victim during his arrest on February 11, 1999. Notwithstanding the above, the petitioner has failed to report specifically on the requirement of previous exhaustion of the corresponding domestic remedies. The IACHR also observes that the record of the case contains no information on complaints filed by the petitioner or the alleged victim regarding treatment or beatings by military police in Rio de Janeiro during his arrest on February 11, 1999.<sup>1</sup> Also, according to the evidence presented by the State and not contested by the petitioner, the death of the alleged victim at the prison hospital was supposedly caused by bronchial pneumonia, that is to say, it was allegedly attributed to natural causes.<sup>2</sup> Therefore the Commission finds that the current petition is inadmissible regarding these allegations because it does not fulfill the requirements provided for in Article 46.1.a of the American Convention, nor does it state facts that *prima facie* tend to establish a violation of rights protected in said Convention, pursuant to its Article 47.b.

15. Besides, the IACHR observes that on January 29, 2002 the petitioner filed a civil action for compensation of non-material damages against the state of Rio de Janeiro (Civil Action No. 2002.001.021529-6)<sup>3</sup>, alleging "negligence in the course of medical attention."<sup>4</sup> The IACHR also notes that, as a result of this action, the petitioner was favored by first and second instance judgments which are now *res judicata*.<sup>5</sup> In spite of the above, according to the information provided by both parties, (*supra* paras. 7 and 10), the State has failed to pay the corresponding *precatório*.

16. Regarding the lack of payment of a *precatório* owed by the Brazilian State, the IACHR has already adopted an admissibility decision on this issue: Report 144/11, P-1050-06 (Pedro Stábile Neto and other civil servants from the municipality of Santo André), of October 31, 2011.<sup>6</sup> Following the

<sup>1</sup> *Forensic Examination Order*. Annex to the State's brief of July 14, 2010 - Copies of the case file in Civil Action 2002.001.021529-6, p. 64. In effect, this document shows that the alleged victim stated that he had gone into convulsions during his arrest, the reason why he presented a small wound on his left knee.

<sup>2</sup> *Forensic Examination Order*. Annex to the State's brief of July 14, 2010 - Copies of the case file in Civil Action 2002.001.021529-6, p. 64. The cause of death, was also corroborated by a supplementary expert witness report required in the context of this civil action. (See expert witness statement of Dr. Luíz Carlos Marinho. Annex to the State's brief of July 14, 2010 - Copies of the case file in Civil Action 2002.001.021529-6, pp.103-105).

<sup>3</sup> Subsequent to the filing of the petition before the Inter-American Commission.

<sup>4</sup> See complaint in the civil action for compensation of non-material damages of January 29, 2002. Annex to the State's brief of July 14, 2010 - Copies of the case file in Civil Action 2002.001.021529-6, pp.02-08.

<sup>5</sup> See March 14, 2006, first instance decision; second instance decision of June 6, 2007; Notification of the state of Rio de Janeiro informing that it would not be filing additional remedies; and certification of August 17, 2007. Annex to the State's brief of July 14, 2010 - Copies of the case file in Civil Action 2002.001.021529-6, pp. 147-149, 197-201, 203-204, respectively.

<sup>6</sup> See also, on the same point, IACHR, Report No. 145/11, Admissibility, Petition 1140-04, *Clélia de Lurdes Goldenberg and Rita de Cassia da Rosa*, October 31, 2011.

practice of the adoption of *per curiam* decisions,<sup>7</sup> the Inter-American Commission concludes, regarding the analysis on admissibility of this matter, that the Brazilian legislation fails to provide for adequate and effective remedies to ensure payment of the *precatórios* owed by the State. Therefore, the exception provided for in Article 46.2.a of the American Convention regarding the exhaustion of domestic remedies is applicable to the instant case. According to the available information the alleged non-compliance with the final judgment or, in other words, the lack of payment of said *precatório* is still ongoing and therefore the petition was filed within a reasonable time, pursuant to Article 32.2 of the IACHR's Rules. The Commission also concludes that the requirements established in Articles 46.1.c and 47.d of the American Convention have been satisfied.

17. 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 Inter-American 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. In this case, the IACHR finds that if found to be true, the petitioner's allegations could establish violations of the rights enshrined in Articles 8, 21 and 25 of the American Convention, in conjunction with Articles 1.1 and 2 of the same treaty.

18. Consequently, the IACHR decides that the petition is admissible in connection with the abovementioned rights protected by the American Convention. Regarding the allegations referred to in paragraph 14 *supra*, the IACHR finds that the petition is inadmissible because it fails to satisfy the requirement provided for in Article 46.1.a of the American Convention, and does not state facts that tend to establish a violation of the rights guaranteed by the Convention pursuant to its Article 47.b.

#### IV. CONCLUSIONS

19. The Inter-American Commission concludes that it is competent to take up the claims filed by the petitioner, pursuant to Articles 46 and 47 of the American Convention. On the basis of the aforementioned factual and legal considerations and without prejudging the merits of the matter,

#### THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

##### DECIDES:

1. To declare the instant petition admissible in relation to Articles 8, 21 and 25 in relation to Article 1.1 and 2 of the American Convention;
2. To declare inadmissible the allegations referred to in paragraph 14 of this decision
3. To notify this decision to the State and the petitioners;
4. To continue its examination of the merits of the matter;
5. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on the 20<sup>th</sup> day of the month of March 2012.  
(Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Felipe

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<sup>7</sup> See, IACHR, Report No. 133/09, Inadmissibility, Petition 989-04, *Social security contributions of retired and pensioned civil servants – Physicians Union of the Federal District (Brazil)*, November 12, 2009, para. 21; and Report No. 134/09, Inadmissibility, Petitions 1133-04 and 115-05, *Social security contributions of retired and pensioned civil servants– UNAFISCO, CONAMP et al. (Brazil)*, November 12, 2009, para. 23.

González, Second Vice-President; Dinah Shelton, Rodrigo Escobar Gil, Rosa María Ortiz, and Rose-Marie Antoine, Commissioners.