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REPORT No. 11/16
PETITION 362-09
REPORT ON ADMISSIBILITY

LUIZA MELINHO
BRAZIL

Approved by the Commission at its session No. 2063 held on April 14, 2016
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I. SUMMARY

1. On March 26, 2009, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission” or “IACHR”) received a petition filed by Thiago Cremasco, who later included *Justiça Global* as a co-petitioner (hereinafter “the petitioners”) against Brazil (hereinafter “Brazil” or “the State”). The petition was filed on behalf of Luiza Melinho (hereinafter “the alleged victim” or “Ms. Melinho”), whose human rights had allegedly been violated by the State in a procedure related to gender affirmation surgery.

2. The petitioner argues that the Brazilian State violated the alleged victim’s human rights by refusing to perform a gender affirmation surgery through the public health system and refusing to pay for the surgery to be performed in a private hospital, as this prevents her from leading a dignified life and jeopardizes her life and physical wellbeing. In addition, the petitioners claim that the State violated the alleged victim’s rights by denying her access to effective remedies to ensure those rights. For its part, the State argues that the petition is inadmissible because domestic remedies were not exhausted and because there was no violation of rights protected under the American Convention on Human Rights (hereinafter “American Convention” or “Convention”).

3. Without prejudging the merits of the complaint, having reviewed the positions of the parties and in keeping with the requirements of Articles 46 and 47 of the American Convention, the Commission decides to declare the case admissible for the purpose of examining the alleged violation of the rights enshrined in Articles 5, 8, 11, 24, 25, and 26 of the American Convention in connection with the obligations set forth in Articles 1.1 and 2 as they relate to Ms. Melinho. The Commission also decides to notify the parties of this decision, to publish it and to include it in its Annual Report to the General Assembly of the OAS.

II. PROCESSING BY THE IACHR

4. The IACHR received the petition on March 26, 2009, and, on June 27, 2014, forwarded a copy of the relevant documents to the State, setting a three-month deadline to submit its observations, based on Article 30.3 of its Rules of Procedure. The State’s response was received on October 27, 2014, and forwarded to the petitioners on November 14, 2014. The petitioners submitted additional observations on December 15, 2014, and the State submitted additional observations on August 13, 2015. These communications were duly forwarded to the opposing parties.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

5. The petitioners claim that the alleged victim suffered for many years because she could not identify with her birth sex and attempted suicide in 1997 and 1998. According to the petitioners, the alleged

¹ Commissioner Paulo Vannuchi, a Brazilian citizen, participated neither in the deliberations nor in the decision regarding this petition, in accordance with Article 17.2.a of the Rules of Procedure of the Commission. Similarly, Commissioner James L. Cavallaro participated neither in the deliberations nor in the decision regarding this petition, in accordance with Article 17.2.b of the Rules of Procedure.

victim believed the surgical gender affirmation procedure was the only way to secure a dignified life and ensure her life and physical wellbeing. They claim, however, that when she sought to obtain such surgery, the alleged victim's human rights were violated by the State.

6. The petitioners state that on September 10, 1997, the Federal Medical Board of Brazil (hereinafter, "CFM-BR") issued a resolution regulating female gender affirmation surgeries in the country. The resolution stated that only university and public research hospitals ("*hospital público adequado à investigação médica*") could perform such surgeries when patients: i) demonstrate discomfort with their "natural anatomical" sex; ii) express the desire to remove their birth genitals, thereby losing the primary and secondary characteristics of their own sex, and indicate the wish to obtain the genitalia of the opposite sex; iii) suffer from this "disturbance" continuously and consistently for at least two years; iv) are not diagnosed as having "other mental disorders"; v) are "diagnosed as transsexual"; vi) are over 21 years old; and vii) have no physical features unsuited to the surgery. In addition, the 1997 CFM-BR resolution stated that patients should be selected by a multidisciplinary medical team consisting of a psychiatrist, a surgeon, a psychologist, and a social worker, following joint medical supervision.

7. According to the petitioners, on April 8, 1998, the Clinical Hospital of the *Universidade Estadual de Campinas* (hereinafter "UNICAMP Hospital"), a public hospital dedicated to medical research and charged with providing highly complex medical care for the community, performed its first gender affirmation surgery. They claim that following the surgery, the hospital superintendent issued public statements to the effect that the hospital had diagnosed six other patients who could undergo the surgical procedure and that it would perform a maximum of four such surgeries per year.

8. The petitioners state that Ms. Melinho received medical care at this hospital in February 1997, when she was admitted to the hospital due to her first suicide attempt. They further assert that Ms. Melinho received medical supervision from the Interdisciplinary Group for the Study of Sex Determination and Differentiation (hereinafter "GIEDS"), and submitted medical reports to the effect that in 2000 the hospital had confirmed that Ms. Melinho was a transsexual, and that in 2001 she was referred and admitted to the UNICAMP Hospital's Gender affirmation Program to undergo a series of medical procedures in preparation for the gender affirmation surgery.

9. Accordingly, they indicate that on March 13, 2001, the alleged victim was admitted to the UNICAMP Hospital to change the aesthetics of her larynx. However, they assert that this surgery was canceled due to the absence of the anesthesiologist, who was out for lunch. The petitioners further report that, after this cancellation, the hospital said it would no longer perform gender affirmation surgeries due to their complexity and because it was unable to maintain the multi-disciplinary team required by the CFM-BR. Therefore, the hospital reported that Ms. Melinho would have to go to another public hospital for surgery.

10. However, the petitioners allege that Ms. Melinho could not go to another public hospital. They say that only five public hospitals nationwide were performing gender affirmation surgeries at the time, that the closest hospital, the Clinical Hospital of the *Universidade de São Paulo* (hereinafter "USP Hospital") was not admitting new patients for this surgical procedure, and that there was no estimate as to when they would be selecting new patients. Furthermore, this hospital reportedly refused to use the diagnoses prepared by the physicians of the UNICAMP Hospital, and Ms. Melinho would have had to restart the medical supervision performed by the UNICAMP Hospital with physicians of the USP Hospital multidisciplinary team. Repeating all the medical supervision at this hospital would also mean constant travel for the alleged victim from Campinas to São Paulo for at least two years, which would make it too expensive for the alleged victim. The petitioners allege that given the inability to perform the surgery at the UNICAMP Hospital or at another public hospital, and the consequential deterioration of her psychological state, Ms. Melinho mutilated her own genitals in January 2002.

11. The petitioners claim that in April 2002, the alleged victim sent the UNICAMP Hospital an extrajudicial notice requesting that it perform her gender affirmation surgery. In response, the hospital said it had only performed this type of surgery in compliance with a court order and had neither promised to

perform such surgeries on other patients nor contemplated doing so. In addition, according to the petitioners, the hospital said that the only duty of the GIEDS, the hospital group that attended to Ms. Melinho, was to help diagnose a possible “identity disorder.” According to the hospital, the GIEDS did not perform the duties of the multidisciplinary team mentioned in the 1997 CFM-BR resolution, and the hospital had no team with these characteristics. Therefore, despite having the required professionals, the hospital said it did not have a team to work together as a unit, as required by the resolution.

12. The petitioners assert that after this notification, on May 6, 2002, a hospital psychiatrist responsible for the alleged victim’s medical attention, sent a letter to the Medical Ethics Commission and the Clinical Director of the UNICAMP Hospital, requesting that, having necessary technical and human capability, the hospital help all patients in the same situation as Ms. Melinho to realize their desire to undergo gender affirmation surgery. In her letter, this physician reported the intense suffering that such persons experience, and their inability to receive care at another public hospital.

13. The petitioners state that on November 6, 2002, CFM-BR issued a new resolution amending the regulations for gender affirmation surgeries. According to the petitioners, the 2002 CFM-BR resolution was identical to the first, except that it: i) authorized performance of female gender affirmation surgeries in public and private hospitals that did not conduct medical research; and ii) for the first time, authorized male gender affirmation surgeries in public hospitals dedicated to medical research.

14. On November 8, 2002, the alleged victim filed a lawsuit against the *Universidade Estadual de Campinas*, based on the Federal Constitution of Brazil and various international human rights treaties, claiming that the hospital had created the expectation that it would carry out the gender affirmation surgery and that the judicial branch should order it to do so or pay for it to be carried out at a private hospital. According to the petitioners, the hospital raised this expectation through: i) public statements that the hospital would perform a maximum of four gender affirmation surgeries per year; ii) the intensive medical supervision of the alleged victim for over five years; and iii) the report prepared by physicians of this hospital authorized Ms. Melinho for assessment and performance of the gender affirmation surgery. In addition, the alleged victim requested compensation for moral damages resulting from the frustration suffered due to the hospital’s refusal to perform her surgery. Furthermore, the alleged victim requested that the Office of the Attorney General be called upon to participate in the process and take action to ensure comprehensive medical care for trans persons, including the performance of gender affirmation surgeries.

15. Due to her psychological state and the health risks posed by possible delays in the proceedings, the alleged victim requested an advance relief to compel the hospital to perform the surgery urgently or pay for it to be performed at a private hospital. The petitioners report that the request for advance relief was dismissed on October 14, 2003, as “premature, particularly due to the irreversibility of the outcomes, which did not justify the risks of a summary judgment.”

16. The petitioners claim that the grounds for the decision show that the Brazilian legal system had no effective recourse to ensure urgent performance of a sex affirmation surgery. The petitioners contend that the State itself acknowledged the lack of effective remedies for the prompt performance of urgent gender affirmation surgeries. They further argue that the nature of the decision to allow someone to undergo surgery, which would depend on a medical opinion, prevented the judiciary from obliging a hospital to perform the surgery in cases of opposing medical and technical decisions.

17. The petitioners indicate that, after the request for advance relief was denied, the procedure continued and the judge in charge of the case sent an official letter to the CFM-BR asking whether the UNICAMP Hospital had ever been registered to perform gender affirmation surgeries, and whether such registration would be an essential prerequisite for a hospital to perform such surgeries. In response, the CFM-BR informed that no hospital would need prior registration or authorization to perform a gender affirmation surgery, and that it would suffice for the hospital to meet the requirements set forth in the CFM-BR resolutions.

18. The petitioners indicate that the judge also sent an official letter to the USP Hospital asking whether it was able to perform Ms. Melinho's gender affirmation surgery. The petitioners provide documents that show that in response, the hospital claimed to have the multidisciplinary group required by the 2002 CFM-BR resolution, but that it would not be taking on new patients at that time due to the large number of people already awaiting the surgery and because the hospital was undergoing renovations. The hospital further informed the judge that it could not use diagnoses conducted by physicians of other institutions. For this reason, before the surgery, a new patient would have to undergo at least two years of medical supervision with professionals of that hospital. In addition, the hospital indicated that there was no deadline for reopening the selection process for new patients.

19. Meanwhile, on November 9, 2004, the Office of the Attorney General presented a writ indicating that it understood that its participation in the procedure was unnecessary, because it was not a matter of correcting the civil registration. According to the petitioners, the Office of the Attorney General had made a copy of the case file in order to study the adoption of other measures, but it never took any action to ensure that the UNICAMP Hospital would provide comprehensive medical attention for trans persons. The petitioners further allege that the Office of the Attorney General had been negligent in its obligation to guarantee individual and collective rights of trans persons.

20. Given the responses provided by these entities, the petitioners note that in March 2005, the alleged victim reiterated her request to have the surgery performed promptly, but that the court did not even address this request. The petitioners claim that because it was not possible to turn to another public hospital for surgery, since it was impossible to obtain a satisfactory resolution through the court system, and due to delays in the trial proceedings, in September 2005 the alleged victim had no choice but to ensure her dignity by contracting debt in order to pay for her gender affirmation surgery in a private hospital. According to the petitioners, the surgery was performed on the basis of the medical diagnoses prepared by the UNICAMP Hospital. The petitioners indicate that after the surgery, the alleged victim began to live a dignified, healthy life and was able to rectify her civil registration through a judicial process that took a little over a year.

21. According to the petitioners, on February 8, 2006, the court ruled against the alleged victim. The decision stated that it was not justifiable to oblige the UNICAMP Hospital through judicial means to perform the gender affirmation surgery on the alleged victim, due to the complexity of the procedure and because the process of selecting new patients for this type of procedure was closed in that hospital. It further stated that, despite the requirement to undergo continual, consistent medical supervision, Ms. Melinho had missed several appointments. It also stated that Ms. Melinho could have gone to another hospital but had chosen not to do so for personal reasons. The ruling concluded that there was no omission or delay in the medical attention provided for Ms. Melinho by the UNICAMP Hospital, since there had been no contract obliging the hospital to perform her surgery. Therefore, according to the judgment, Ms. Melinho had the mere expectation of a right. Having found no unlawful act committed by the hospital, the court determined that there were no grounds to indemnify Ms. Melinho for damages or for the cost of the surgery performed in a private clinic.

22. The petitioners state that on April 27, 2006, the alleged victim appealed this decision to the Court of Justice of São Paulo (hereinafter "TJSP"). They further said that on August 23, 2007, while this appeal was still pending, Regional Federal Court No. 4 (hereinafter "TRF-4") issued a nation-wide decision including gender affirmation as one of the surgical procedures that should be provided by the public health system. The petitioners note that, despite this decision, the TJSP rejected Ms. Melinho's appeal on June 9, 2008. The petitioners provided a copy of this decision to show that TJSP copied the reasoning of the trial judge's decision verbatim and added a paragraph of its own reasoning, stating that: i) even if it were to accept that the UNICAMP Hospital had authorized Ms. Melinho to undergo the surgery, this would not ensure the patient any right that the surgery be carried out; ii) the mere expectation of a right does not constitute sufficient grounds for compensation when that expectation is frustrated; and iii) the obstacles identified by the hospital suffice to exonerate it from any liability for failing to perform the surgery.

23. In light of the above, the petitioners argue that the alleged victim had no access to effective remedies to ensure her rights. In addition, opposing the State's position, the petitioners state that the alleged victim would not have to appeal the appeal court's decision by filing a special and extraordinary appeal to the Superior Court of Justice (hereinafter "STJ") and the Supreme Court (hereinafter "STF"), respectively, since these were exceptional, highly restrictive resources that would not be effective. They further argue that domestic proceedings would have lasted for an unreasonable amount of time.

24. The petitioners further point out that, despite some progress made regarding the LGBT rights in Brazil, the situation of transgender people is still worrying and the services offered precarious. In this regard, the petitioners indicate that from 2008 to 2013, 486 transgender persons were murdered in the country, and the State never invested in campaigns of respect for trans persons and the prevention of violence against them. In addition, they report that the only state efforts to improve the situation of trans persons have focused on gender affirmation, but that this has not been done satisfactorily, since few more than 100 surgeries have been performed in the country since 1998, and only five public hospitals perform this surgical procedure. The petitioners further argue that the restrictions imposed on access to healthcare for trans persons is a form of discrimination. In addition, they argue that the lack of regulations for the rectification of civil registration for transgender people results in the need for a lengthy legal process to change their papers in the country, which in itself may constitute a violation and cause intense frustration and suffering for trans persons.

25. Furthermore, the petitioners argue that all other trans persons that went to UNICAMP Hospital to carry out their gender affirmation surgery and had their hopes frustrated also had their rights violated.

26. Based on the above, the petitioners allege that the State violated the rights enshrined in Articles 1, 4, 5, 8, 11, and 25 of the American Convention, in detriment of Ms. Melinho and other trans persons who went to UNICAMP Hospital seeking their gender affirmation procedure.

B. The Position of the State

27. The State contends that the alleged victim failed to exhaust all domestic remedies, because she did not appeal the decision of the TJSP. According to the State, Brazilian law requires filing appeals with the STJ and STF when disputes are based on federal laws, international treaties or the federal constitution, as is Ms. Melinho's case. The State alleges that the two appeals could have effectively secured the claim of the alleged victim, since the right to undergo sex affirmation surgery through the public health system was recognized in a judgment of the TRF-4 in 2007, which resulted in a reform of the public policies concerning the attention provided with respect to the health of trans persons and other members of the LGBT community. Given the above, the State concludes that the alleged victim, despite having access to effective remedies to sustain her claims, decided not to exhaust them and has now turned to the IACHR as a fourth instance court.

28. Regarding appeals filed, the State indicates that they respected due process and that the alleged victim had every opportunity to submit evidence and attend hearings. The State further asserts that the procedure was of a reasonable duration.

29. The State further argues that the facts narrated by the petitioners do not constitute violations of rights protected by the American Convention. First, the State believes that the alleged violations narrated by the petitioners are subsumed in a possible violation of the right to health guaranteed by Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter "Protocol of San Salvador") and stated that the Commission has no jurisdiction to examine an alleged violation of this article under individual petitions.

30. The State further asserts that the medical supervision provided by the UNICAMP Hospital to Ms. Melinho was primarily psychological in nature. In this regard, it indicates that Ms. Melinho was initially

treated at that hospital in 1997 following a suicide attempt, and that she was still being monitored by professionals of that hospital until the date of the State's writ of October 27, 2014. According to the State, during these years of medical supervision, the hospital always informed Ms. Melinho that it did not perform gender affirmation surgeries and never promised or stated that it would perform the surgery. Accordingly, it indicates that in May 2001, the Clinical Director of the UNICAMP Hospital informed Ms. Melinho that due to its complexity and the lack of suitable professionals, the hospital could not perform the gender affirmation surgery. Given the above, the State indicates that Ms. Melinho had the mere expectation that the surgery would be performed at this hospital.

31. The State further indicates that according to the Ministry of Health, the fact that some hospitals offer psychological supervision and counseling prior to gender affirmation surgery does not necessarily mean that they should perform such surgeries. The State asserts that this was the situation of the UNICAMP Hospital, which informed Ms. Melinho that gender affirmation surgery would not be possible because it was unable to provide multidisciplinary and joint medical supervision during the period specified in both CFM-BR resolutions. However, the State indicates that the fact that the UNICAMP Hospital did not perform gender affirmation surgeries did not violate the rights of Ms. Melinho, as she was always directed to find another public hospital suitable for surgery but chose not to do so because she did not want to restart the two years of medical supervision at another hospital, as required by both CFM-BR resolutions.

32. In addition, the State asserts that the Brazilian public health system provides suitable medical care to transgender people, only one component of which is gender affirmation surgery. The State further mentions that the public health system has gone through several reforms to provide enhanced medical care for trans and other LGBT persons since 2009.

33. In conclusion, the State contends that, given the fact that not all domestic remedies were exhausted and the American Convention was not violated, the petition is inadmissible; and it requests that the Inter-American Commission issue a statement to that effect.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

34. In principle, the petitioners are entitled by Article 44 of the American Convention to lodge petitions with the Commission. The petition named as alleged victims persons that can be individualized, whose rights the Brazilian Government undertook to respect and guarantee pursuant to the American Convention. As regards the State, the Commission notes that Brazil has been a State party to the American Convention since September 25, 1992, the date on which it ratified this instrument. Therefore, the Commission has *ratione personae* competence to examine the petition.

35. Likewise, the Commission has *ratione loci* competence to hear the petition, because the petition alleges violations of rights protected by the American Convention within the territory of Brazil, a State party to that treaty. The Commission has *ratione temporis* competence because the obligation to respect and ensure the rights protected in the American Convention was already in effect for the State on the date on which the alleged events in the petition occurred.

36. Finally with regard to *ratione materiae* competence, the petitioners allege violations of human rights protected by the American Convention, for which reason the Commission has *ratione materiae* competence to review the violations alleged by the petitioners through the individual petitions system.

B. Admissibility Requirements

1. Exhaustion of Domestic Remedies

37. Article 46.1.a) of the American Convention requires prior exhaustion of remedies available under domestic jurisdiction in keeping with generally recognized principles of international law as a requirement for admission of a petition alleging violation of the American Convention. The purpose for this requirement is to make it possible for national authorities to examine alleged violations of protected rights and, where appropriate, to resolve the situation before it is heard by an international body. Furthermore, Article 46.2 of the Convention provides that the requirement of prior exhaustion of domestic remedies does not apply when (i) the domestic law of the State in question includes no legal process to protect the allegedly violated right or rights; (ii) the persons alleging violation of their rights were not allowed access to remedies under domestic law or were prevented from exhausting them; or (iii) the decision on said remedies was unreasonably delayed.

38. The petitioners submit that judicial remedies were not effective in ensuring that Ms. Melinho could undergo her surgery. They further contend that there was an unwarranted delay in the domestic proceedings. However, they also maintain that all domestic remedies were exhausted with the appeal decision and that there was no need to file extraordinary appeals with higher courts. For its part, the State pointed out that the process had a reasonable duration and that it was necessary to file appeals with the STJ and STF to exhaust all domestic remedies. It further noted that these resources would have been effective to satisfy the objectives of the alleged victim since a decision of TRF-4 established the State's obligation to provide gender affirmation surgeries through the public health system.

39. The IACHR notes that the law suit filed by the alleged victim requested that the State perform the surgery in a public hospital or pay for it to be performed in another hospital, and requested compensation for damages suffered because the UNICAMP Hospital refused to perform the surgery. The IACHR further notes that the fact that the alleged victim chose to undergo the surgery in a private hospital in September 2005 did not end domestic proceedings, which continued with the purpose of obtaining reimbursement for the cost of this surgery and compensation for the damages allegedly suffered. Accordingly, a trial court decision was issued on February 8, 2006, and an appeal decision was issued on June 9, 2008.

40. The IACHR takes note of the State's argument regarding the need to file special and extraordinary appeals with the STJ and STF to exhaust all domestic remedies. However, the Commission notes that by the date of the TJSP decision, the process had already lasted almost six years. Because of the circumstances of the case, the Commission considers that there were unwarranted delays in the domestic proceedings and that it would be unreasonable to require the filing of extraordinary appeals to higher courts. Therefore, the Commission concludes that in this case, an exception applies to exhausting all domestic remedies pursuant to Article 46.2.c) of the American Convention with regard to the claims of Ms. Melinho.

41. Article 46.2 of the American Convention, by its very nature and purpose, is a provision whose content is autonomous in relation the substantive provisions of the Convention. Therefore, the decision as to whether exceptions to the domestic remedies exhaustion rule apply to the case in question, should be made prior to and separate from a review of the merits of the matter, because it depends on a different standpoint from the one used to determine whether Articles 8 and 25 of the Convention have been violated. It should be noted that the causes and effects that prevented the alleged victim from exhausting all domestic remedies in this case will be analyzed, as relevant, in the report adopted by the Commission on the merits of this dispute, to determine whether they constitute violations of the Convention.²

42. Aside from this, the IACHR takes note of the petitioners' submissions concerning other persons who went to the UNICAMP Hospital in order to perform their gender affirmation surgery and had

² IACHR, Report No. 48/15, Petition 79-06. Admissibility. Yaqui People. Mexico. July 28, 2015, para. 56.

their hopes frustrated; persons referred to by the petitioners as alleged victims in their submissions. In this regard, the Commission considers that the petitioners fail to provide any specific information about their situation as well as on the steps taken by these people and their current status. Therefore, it is not possible to determine whether these persons exhausted all domestic remedies or whether any exceptions apply.

2. Time Period for Submitting the Petition

43. In the claim under review, the IACHR has established that the exception to exhausting all domestic remedies under Article 46.2.c) of the American Convention applies. In this regard, Article 32(2) of the Commission's Rules of Procedure establishes that in all cases where exceptions apply to the prior exhaustion of all domestic remedies, the petition shall be filed within a reasonable time period, as determined by the Commission. To this end, the Commission must consider the date of the alleged violations of rights and the circumstances of each case.

44. The Commission notes that Ms. Melinho had the expectation that the State would perform her gender affirmation surgery through the public health system, or reimburse her for the expense of the surgery in a private hospital and compensate her for alleged moral damages. The facts of the case indicate that Ms. Melinho attempted to achieve her purpose ever since the UNICAMP Hospital performed a gender affirmation surgery on another patient in 1998. The Commission also notes that to this date, Ms. Melinho has failed to satisfy her objectives. Therefore, given the context and characteristics of this case, the Commission considers that the petition was submitted within a reasonable time period and that the admissibility requirement regarding the time period for submission has been met.

3. Duplication of Proceedings and International *Res Judicata*

45. The case file gives no reason to believe that the subject of the petition is pending in any other international proceeding, neither that it duplicates any petition already examined by this or any other international body. Consequently, the Commission finds that the requirements set out in Articles 46(1)(c) and 47(d) of the Convention have been met.

4. Characterization of the Alleged Facts

46. For the purposes of admissibility, the Commission must decide whether the alleged facts could constitute a violation of rights as stipulated in Article 47(b) of the American Convention, or the petition is "manifestly groundless" or "obviously out of order" in accordance with paragraph (c) of that Article. The criterion for examining admissibility differs from those to review the merits of the matter, since the Commission only conducts a *prima facie* review to determine whether the petitioners establish the apparent or possible violation of a right guaranteed under the American Convention. This is a summary review that does not imply any prejudgment or preliminary opinion on the merits of the matter.

47. Moreover, neither the American Convention nor its Rules of Procedure require that petitioners identify specific rights allegedly violated by the State in a matter referred to the Commission, although petitioners may do so. Based on the jurisprudence of the system, the Commission's admissibility reports are to determine what provisions of the relevant inter-American instruments are applicable, the violation of which could be established should the alleged facts be proven by sufficient evidence.

48. The petitioners argue that the State's refusal to perform Ms. Melinho's gender affirmation surgery at a public hospital, its refusal reimburse her for the expenses of the surgery performed in a private hospital, and its refusal to grant her any compensation for the alleged moral damages, constitute violations of Articles 1, 4, 5, 8, 11, 24, and 25 of the American Convention to the detriment of Ms. Melinho. In turn, the State argues that the events narrated by the petitioners show no violation of rights protected by the American Convention and that the Brazilian public health system provides adequate medical care for trans persons.

49. The jurisprudence of the inter-American system has already established that sexual orientation, gender identity and non-discrimination on the grounds of gender identity are essential components of people's private lives. The right to privacy guarantees spheres of intimacy that neither the State nor anyone else can invade, such as the ability to develop one's personality and aspirations and to determine one's own identity, as well as areas of activity that are personal and autonomous, such as decisions, interpersonal relationships, and home and family.³

50. The Commission notes that the UNICAMP Hospital began to provide medical care for Ms. Melinho in 1997 after her first suicide attempt, and that the hospital refused to perform gender affirmation surgery on the alleged victim because it did not meet the requirements established in the resolutions of Brazil's Federal Medical Board. According to the State, the hospital was unable to perform Ms. Melinho's gender affirmation surgery because it lacked a multidisciplinary medical team to conduct a joint, continual medical supervision of the alleged victim for at least two years, as required by the Federal Medical Board of Brazil.

51. The IACHR also notes that the domestic courts dismissed Ms. Melinho's claim and appeals because they understood, in part, that she was able to turn to another public hospital, specifically the USP Hospital, which she had failed to do for "personal reasons". However, official letters from this hospital indicate, *prima facie*, that the hospital could not perform Ms. Melinho's surgery because it was not accepting new patients for this surgical procedure and did not know when it would start accepting new patients again.

52. In addition, the Commission notes that the "personal reasons" referred to by the State and mentioned in the domestic decisions were Ms. Melinho's alleged unwillingness to undergo continual medical supervision for at least two years with a multidisciplinary team of the USP Hospital. However, as mentioned earlier, Ms. Melinho claims to have undergone gender affirmation surgery at a private hospital based on the diagnoses made by the UNICAMP Hospital physicians, and the State has not said that the USP Hospital was legally obliged to restart the entire period of medical supervision.

53. The Commission also notes that both CFM-BR resolutions require that medical supervision be conducted for a minimum of two years, but neither sets a maximum period for this supervision nor allows for a shorter term under particular circumstances. In this regard, the Commission notes that in the case of *Schlumpf vs. Switzerland*, the European Court of Human Rights (hereinafter "the ECHR"), upon analyzing the imposition of objective deadlines for the performance of gender affirmation surgeries with no regard for the individual circumstances of each case, said that imposing such limits may lead to a violation of the right to privacy.⁴

54. In the case at hand, when the domestic courts claim that the alleged victim could have gone to another public hospital and that she failed to do so because she did not want to restart the two-year medical supervision period, they seem, *prima facie*, to fail to take into account the individual circumstances of the alleged victim.

55. Given the above, and in view of the facts and laws submitted by the parties and the nature of the matter before it, the Commission considers that, if proven, the allegations could characterize possible

³ IACHR, Report No. 4/01, Maria Eugenia Morales de Sierra (Guatemala), 19 January 2001, para. 47, and IACHR, Report No. 38/96, X and Y (Argentina), October 15, 1996, para. 91. See also I/A Court HR, *Atala Riffo and Girls vs. Chile*, Judgment of February 24, 2012 (Merits, Reparations and Costs), paras. 84, 85, 91-93.

⁴ *ECHR Affaire Schlumpf c. Suisse. Requête No. 29002/06. Arrêt Définitif*, June 5, 2009, para. 111-115. In *Schlumpf vs. Switzerland*, the ECHR examined the situation of a 67-year-old man who wanted to undergo gender affirmation surgery after obtaining medical diagnoses favorable to the performance of such surgery. The Court noted that the applicable law required a two-year medical supervision and concluded that national authorities should have taken into account the opinions of experts to consider whether it was appropriate to grant an exception to the two-year rule, particularly in view of the relatively advanced age of the applicant and the interest in undergoing surgery promptly. Accordingly, this court stated that respect for private life requires the inclusion of medical, biological and psychological considerations, unequivocally expressed by the opinion of a medical expert to avoid a mechanical application of a time period.

violations of the rights protected by the American Convention, Articles 5 (right to humane treatment), 8 (right to a fair trial), 11 (right to privacy), 24 (right to equal protection) and 25 (right to judicial protection), in concordance with Articles 1.1 and 2 thereof.

56. Additionally, the IACHR will consider at the merits stage whether the allegations, if proven, could constitute a violation of Article 26 (progressive development) of the American Convention.

57. However, as for the petitioner's claim regarding the alleged violation of Article 4 (right to life) of the American Convention, the Commission notes that the petitioner does not provide sufficient arguments or support for this alleged violation, wherefore that claim would not be admissible.

V. CONCLUSIONS

58. Based on the findings of fact and law, the Commission concludes that this petition meets the admissibility requirements set forth in Articles 46 and 47 of the American Convention and, without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this petition admissible in relation to Articles 5, 8, 11, 24, 25, and 26 of the American Convention in connection to the obligations established in Articles 1.1 and 2 thereof with respect to Ms. Melinho;

2. To declare this petition inadmissible in relation to Article 4 of the American Convention with respect to Ms. Melinho;

3. To declare this petition inadmissible in relation to the group of unidentified trans persons who turned to the UNICAMP Hospital seeking to undergo the gender affirmation procedure;

4. To notify the parties of this decision;

5. To continue studying the merits of this matter; and

6. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.