

REPORT N° 29/07
PETITION 712-03
ADMISSIBILITY
ELENA TELLEZ BLANCO
COSTA RICA
April 26, 2007

I. SUMMARY

1. On August 24, 2003, the Inter-American Commission on Human Rights (hereinafter the "Commission," "Inter-American Commission", or "IACHR") received a petition lodged by the Center for Justice and International Law (CEJIL) and the *Sindicato de Empleados del Patronato Nacional de la Infancia*, SEPI [Employees' Union of the National Children's Welfare Agency] (hereinafter "the petitioners"). In this petition, the Republic of Costa Rica (hereinafter "Costa Rica," or "the State") is alleged to be responsible for violation of Articles 5, 11, 17, 19, 24, and 25 of the American Convention on Human Rights (hereinafter the "American Convention" or the "Convention"), considered together with Article 1(1) of that international instrument, and Article 7 of the Convention of Belém do Pará, to the detriment of Mrs. Elena Tellez Blanco (hereinafter the "alleged victim").

2. The petitioners contend that the alleged victim, as a worker for the centers or shelters established by the *Patronato Nacional de la Infancia* (hereinafter "PANI"), has an excessive, disproportionate working day, which often extends to 24 hours a day for 11 consecutive days. They further allege that this situation is a form of labor discrimination, due in part to the fact that the alleged victim is female, and that it has violated her rights to humane treatment, to protection of the family, and to privacy and family life. Moreover, in view of this situation, the State has failed to guarantee due judicial protection.

3. The State requested the Commission to declare the case inadmissible on the basis of the fact that domestic remedies had not been exhausted and that the alleged victim acted in bad faith by failing to refer to labor procedures that are still pending in the Costa Rican courts.

4. Without judging the merits of the matter, the IACHR concludes in this report that the petition is admissible, in accordance with Articles 46 and 47 of the American Convention. The Commission decides, therefore, to advise the parties of this decision and to continue to examine the merits as regards the alleged violation of Articles 5, 24, and 25 of the American Convention, in keeping with the overall obligation to respect and safeguard rights, as provided in Articles 1(1) and 2 of that international instrument. The Commission also decides to publish that decision and to include it in its Annual Report to the OAS General Assembly.

II. PROCEDURES BEFORE THE INTER-AMERICAN COMMISSION

5. The Commission received the petition on August 24, 2003, and assigned it number 712-03. On September 11, 2003, it acknowledged receipt and advised the petitioners that their complaint was under study.

6. On September 17, 2003, the Commission received additional information from the petitioners.

7. On March 18, 2004, the Commission forwarded the information to the State, and granted it a period of two (2) months to submit its observations.

8. On August 18, 2005, the Commission reminded the State that it was waiting to receive its observations.

9. On October 14, 2005, the State sent its observations on said petition to the Commission. On November 28, 2005, the Commission acknowledged receipt of that communication and forwarded the pertinent parts to the petitioners, who were granted one (1) month to submit their observations.

10. On January 26, 2006, the petitioners sent their observations to the Commission. On February 2, 2006, the Commission forwarded the pertinent parts to the State, and granted it one (1) month to submit observations.

11. On February 3, 2006, the Commission informed the petitioners that it had decided to convene a hearing during its 124th regular session to discuss matters related to the petition. It further advised them that said hearing would take place on March 3, 2006, and asked them to send a list of the persons comprising their delegation.

12. On February 20, 2006, the State sent to the Commission a list of the persons who would make up its delegation at that hearing.

13. On March 3, 2006, hearing No. 10 was held, but no decision regarding the petition was made.

14. On June 6, 2006, the Commission sent to the petitioners and the State a communication in which it decided to make itself available to the parties with a view to reaching a friendly settlement, based on the offer extended during the previous hearing. It asked the petitioners to advise the Commission within one (1) month's time if they would be interested in initiating the procedure stipulated in Article 48(1)(f) of the Convention.

15. On August 14, 2006, the Commission received a communication from the State in which it indicated that before initiating the friendly settlement process, it was of the view that the Commission must first decide on the admissibility of the petition. In that brief, Costa Rica also presented arguments to support the inadmissibility of the petition on behalf of Mrs. Tellez Blanco.

16. On December 19, 2006, the petitioners sent a brief to the Commission in which they submitted additional arguments and requested that it issue an admissibility report, since they consider that they have demonstrated that the petition meets the admissibility requirements established in Article 46(1) of the Convention.

III. POSITIONS OF THE PARTIES

A. The petitioners

17. The petitioners indicate that during the thirteen years the alleged victim has worked as an employee at the shelters or centers of the *Patronato Nacional de la Infancia* (PANI), she has had an excessive workload, since it is common for her to work up to 24 hours a day, for 11 consecutive days.

18. The petitioners maintain that the alleged victim is employed as a "Substitute Aunt" at one of the shelters or residences for children in the city of San José, where she is in charge of caring for an average of 10 to 20 children, ranging from infants to adolescents, who frequently exhibit behavioral or psychological problems, or have disabilities, or drug addiction or sexual problems, among others. The petitioners report that often the children are victims of mistreatment, sexual abuse, or abandonment. They add that despite the complexity of the work, there are frequently only two Substitute Aunts in charge of the aforesaid number of children and adolescents, despite the fact that the Care Model for Protection Alternatives for Children and Adolescents of PANI, an official document of the Agency, recommends that for every eight persons protected in the shelter, two substitute aunts be assigned.

19. They further allege that the work is physically, mentally, and intellectually demanding, and that, in accordance with the Employment Section of PANI, it requires that these employees protect the rights of the children in the shelter, supervise their behavior, assist them in their schoolwork, facilitate the

participation of children with special needs, care for sick children day and night, make daily reports, dress the children and put them to bed, ensure conditions of hygiene, bathe them, and change their diapers, among other tasks. The petitioners mention that the care for the minors begins as soon as the substitute aunts (alleged victims) get up, at around 4:00 am, and that as a result of the excessive work, the substitute aunts have been estranged from their own children and from their families in general.

20. The petitioners also argue that the Independent Regulations for the Staff of the *Patronato Nacional de la Infancia* require the substitute aunts to work from Monday to Sunday, from 6:00 am to 6:00 pm, in addition to remaining available at the workplace from 6:00 pm until 6:00 am the next day. After working in the described conditions for eleven days, they receive three days of rest, which, because of the availability obligation stipulated in the regulations, they are not necessarily able to avail themselves of.

21. The petitioners contend that in view of the nature of the work, the presumably simple presence at the workplace or availability usually turns into actual work, in view of the demanding workload resulting from the conditions of the children in the shelter, since the aunts must perform functions that range from care of the children to work similar to that of a domestic servant, teacher, messenger, driver, and nurse.

22. The petitioners argue that the alleged victim is suffering “discrimination in the workplace for reasons of gender,” a situation that in general affects the “Substitute Aunts” in PANI shelters. They state that the very name of the position they hold indicates that they are reserved for women and that in practice all the “Substitute Aunts” are in fact women. They argue that both PANI and the judicial authorities have a stereotyped notion of women whereby “in their role as mothers” they are obliged to look after their children 24 hours a day and do household chores without the right to time off. They assert that this notion has been transferred to the job profile of “Substitute Aunts,” in which they are required to adopt the role of a mother, whereas in fact they are just doing a job they were hired for. While the work done by the “aunts” in looking after the boys and girls in the shelters is important and special, they say “one should not lose sight of the fact that said work is governed by labor laws and regulations, all of which must be observed.” In support of their arguments, they present a report of the Ombudsman (Defensoría de los Habitantes) of Costa Rica, which states that:

Accordingly, in the Ombudsman’s opinion, the work of the “Substitute Aunts” is assimilated to the daily work done by women as housemakers and mothers, whose working hours cannot be limited, so that, from the point of view of the needs and interests of the workers known as “Substitute Aunts” who look after children in PANI, it is important to recall and reaffirm that what they do is work and should not be looked down upon as women’s domestic work, which is regarded as their natural function and consequently rendered invisible.”¹

23. The petitioners report that in May 2000, the PANI Employees Union hired a consulting firm to conduct on-site research into the repercussions of such a work day on the aunts. They indicate that the study concluded that the above-mentioned working conditions were damaging to the physical and mental health of the substitute aunts. They report that because of a personnel shortage, there is an excessive workload and that relations with their children and families were seriously impaired due to their absence from their homes, and even when in their homes, from their exhaustion. They further explain that the level of physical fatigue exceeds acceptable limits of tolerance.

24. In addition, they state that Mrs. Tellez Blanco was the victim of a physical attack in July 2002, when one of the children attacked another child with a knife, and the alleged victim was forced to intervene and struggle with him, who reacted by hitting her, as a result of which Mrs. Tellez had to have an operation, known as an *otroscopía* [translation unknown]. They consider it important to mention that, in the case of the alleged victim, she works by herself at one of the PANI shelters in San José, whereas two substitute aunts work in most of the centers.

¹ Office of the Ombudsman (Defensoría de los Habitantes).

25. The petitioners further allege that the women working in these centers have presented a series of petitions to the Ombudsman's Office and the Labor Inspection Office of the Ministry of Labor and Social Security, all of which have been unsuccessful. As a result, a group of employees filed an *amparo* petition with the Constitutional Chamber of the Supreme Court in 1992, in defense of their basic rights and to request annulment of Article 37 of PANI's Independent Regulations for the Staff,² under which they are required to work from Monday to Sunday, twenty-four hours a day. The petition was based on the provisions contained in Chapter V, Social Rights and Guarantees, Article 58, of the Political Constitution of Costa Rica,³ and on application of the principle of equal remuneration for equal work, in accordance with Article 57⁴ of the aforesaid Political Constitution. The petitioners indicate that in view of the complaints filed, the Constitutional Chamber decided to suspend proceedings on the *amparo* action to give them time to bring the corresponding action of unconstitutionality.

26. The petitioners maintain that the workers used the unconstitutionality action to request the Constitutional Chamber of the Supreme Court of Justice to rule on Article 37.c of PANI's Regulations, given their concern that "the working day established in the contested regulation – 24 hours a day, from Monday through Sunday, exceeds anyone's capacity and is detrimental to the health and wellbeing not only of the "Substitute Aunts" but also of the children who deserve better care and dedication, because many of them suffer from both physical and psychological disabilities." In this regard, on September 5, 1995, that Chamber issued judgment No. 4902-95, finding the action to have partial merit, and annulling paragraph c of Article 37 of those Regulations on the grounds of unconstitutionality, with respect to the phrase "twenty-four hours a day." Said decision established that the type of work subject to review is part of an exceptional work regime, and for that reason the working conditions and the work hours required of the substitute aunts are not in violation of the law. It further decided that this type of work day is necessary for the proper development of the minors, who need continuous daily care. It determined that the work day should be 12 hours instead of 24, which has the effect of making the contested legal provision unconstitutional, and it granted the right to higher wages for the additional hours in the working day, during which the substitute aunts must be available. In that judgment, the Constitutional Court states that the work of the "Substitute Aunts" is:

"practically equivalent to that of a mother, with similar functions, which consist, precisely, in the physical and emotional care expected of a mother for her children, in this case 10 of them, at least three of whom suffer from some physical or mental ailment, so that they have to try and make each child feel that he or she has a home offering affection, stability, understanding, security, confidence, education, and, in short, all those factors needed to ensure his or her integral development as a good citizen capable of finding his or her way in society."⁵

27. In addition, in connection with judgment No. 4902-95 issued by the Constitutional Chamber of the Supreme Court of Justice on September 5, 1995, the petitioners point out that it is important to bear in mind that three of the seven justices sitting in the Constitutional Chamber dissented; they were of the opinion that the entire legal provision under challenge should be declared unconstitutional, and submitted the following statement:

² Article 37 of PANI Regulations: The centers for care of minors shall operate with three categories of personnel: administrative staff; technical staff; and, substitute aunts who shall perform their work according to the following schedule: ... c) The Substitute Aunts shall work from Monday to Sunday, twenty four hours a day. The Executive Board shall determine the days of rest that they are legally entitled to."

³ Article 57. All workers are entitled to a minimum wage, fixed periodically, for a normal working day, that secures them well-being and a decent life. The wage shall always be the same for equal work in identical conditions of efficiency.

Everything pertaining to fixing minimum wages shall be the responsibility of the technical entity determined by law.

⁴ Article 58. The ordinary daytime working hours may not exceed eight hours a day and forty-eight hours a week. The ordinary nighttime working hours may not exceed six hours a day and thirty-six a week. Extra or overtime work shall be remunerated at the rate of fifty percent over the stipulated salary or wage. However, these provisions shall not apply in very special cases determined by law.

⁵ Constitutional Court, Judgment 4902-95.

although it is true that the work day, which is understood to be the time during which workers are at the service of their employer, and which by conventional extension may be established by the parties, may not exceed the legal maximum established in the Political Constitution. The parties may freely agree on the working day during which services are to be rendered, but it is clear that they are not permitted to go beyond the limit imposed as the maximum working day in question.... In view of the above, it is evident that the working day prescribed in Article 37, paragraph (c) of the Independent Work Regulations of the *Patronato Nacional de la Infancia*, by considering a working day of twenty-four hours a day from Monday to Sunday, directly violates the legal provisions in question and for that reason we dissent from the conclusion reached by the majority of the Chamber and declare that Article 37(c) of the Regulations is unconstitutional in its entirety. ...⁶

28. Moreover, the petitioners argue that the judgment of the Constitutional Chamber concludes that the fact that the workers have to remain at the centers (shelters) is not a violation of the Constitution, since they are trust positions, and as long as the working day is no longer than twelve hours, with the corresponding remuneration for overtime, the alleged wage inequality is not present. They add that the Constitutional Chamber also did not consider as a violation to the Constitution the fact that the work week runs from Monday to Sunday, in view of the rest days granted afterwards. The petitioners report that once the unconstitutionality proceeding was over, the *amparo* process that the employees initiated in 1992 was resolved with a judgment in favor on July 10, 1996 (No. 3482-96), but only in respect of the unconstitutional nature of Article 37.c. The judgment declared the appellants' contracts null and void with respect to the 24-hour working day and instructed PANI to rewrite the labor contracts and sign them together with the appellants, this time with a 12-hour work day with the appellants, while recognizing the fact that they remained at the workplace with a wage bonus for availability, which means that the substitute aunts continue to be available on a 24-hour a day basis.

29. In the "considering clauses" of that judgment, the Court includes a summary of the petitioners' case in which they state that, "in short, their work is that of a real mother, but PANI has never acknowledged or encouraged the very special nature of their work, ignoring their requests to that effect. They go on to say that a number of specialists prepared a report on their status and reached the conclusion that, as a result of having to look after more children than they should, they are undergoing greater physical and emotional stress. There are also civil service studies and recommendations that their positions be reclassified, since their salaries and other working conditions bear no relation to the work they actually perform."

30. The petitioners further allege that despite the decision of the Constitutional Chamber, the substitute aunts are still instructed to maintain the working schedule of eleven consecutive days, with a work day that in fact extends to 24 hours, from Monday to Sunday. They state that, given this situation, on June 8, 2002, the Employees Union of PANI filed a second unconstitutionality petition pertaining to paragraph c) of Article 38 of the Independent Staff Regulations,⁷ which establishes that the substitute aunts must remain available at the workplace from 6:00 pm until 6:00 am the next day, which violates both a series of articles of the Political Constitution as well as various rights protected under the American Convention.

31. The petitioners argue that in Judgment No. 2002-06660 dated July 5, 2002 and notified on February 24, 2003, the Constitutional Chamber declared that there was no infringement whatsoever of the fundamental rights of the substitute aunts, since the twelve hour working day established was being observed, and that their work day was being recognized, as was their availability and stay at the workplace, by payment of the appropriate wages. The Chamber considered that these were sufficient grounds to find the complaint inadmissible and to deny it on its merits. This decision cannot be appealed.

⁶ Dissenting vote of Justices Castro Bolaños, Arguedas Ramírez, and Calzada Miranda.

⁷ Article 38, paragraph c): "The Substitute Aunts shall work from Monday to Sunday, from 6:00 until 18:00, but they shall remain at the workplace on availability status from 18:00 to 6:00 of the subsequent day.

32. In these circumstances, the alleged victim and a group of female workers initiated an ordinary labor proceeding against the *Patronato Nacional de la Infancia*, in which they demanded payment for unpaid overtime work and for the unpaid time when they were on availability status, computed at the rate of 40% over the basic wage, since PANI deliberately reduced the overtime wage by 25%. In this proceeding, the Labor Court declared all of the factual allegations in the proceeding to be without merit in Judgment No. 1206 issued on May 7, 2003.

33. Evidence is also provided that another group of PANI workers, in which the alleged victim did not participate, filed an ordinary labor complaint with the Labor Court in which they too requested payment for availability time, at the rate of 40%. In response to this petition, the Court issued Judgment No. 1082 dated May 8, 2003, in which the judge states that the grounds of the claims of these workers should not be centered on payment of an additional percentage over the base wage (as claimed by the complainants), but rather on their disagreement with the working day which is deduced from their complaint,⁸ and on those grounds, the complaint was declared without merit in all its factual allegations.

34. On March 3, 2006, during the 124th regular session of the Commission, hearing No. 10 was held in which the petitioners reiterated the arguments in the petition to the effect that domestic remedies have been exhausted and internal appeals have offered no protection for the legal situation described, that the solutions proposed were neither sufficient nor effective, since the violation persists, and that the State has not taken the necessary steps to remedy and change the work regime to which the substitute aunts working at PANI are subjected.

35. Finally, the petitioners submitted a brief received by the Commission on January 3, 2007, in which they set forth additional arguments to support the admissibility of the case. They contend that the decision issued by the Constitutional Chamber only recognized payment of additional wages to the workers, supposedly for the 12 hours they remain available at the workplace, but did not remedy the violation of the rights that were the source of the complaint or petition, since in practice, the aunts continue to be subjected to a continuous 24-hour work day for 11 consecutive days, and are required to remain at the centers or shelters where they are working and to perform activities to meet the needs of the children under their care. The petitioners further allege that throughout this international process, the State has objected on the grounds of failure to exhaust domestic remedies, by arguing that, among other things, in domestic proceedings the petitioners did not allege violations of the same rights that they alleged to be violated in their petition to the Commission; they contend, nevertheless, that it is evident that the grounds of the complaint are the same, that is, elimination of the regulatory provisions that establish a 24 hour work day for these workers.

36. The petitioners also point out that contrary to the provisions of Article 137 of the Costa Rican Labor Code,⁹ it is apparent that the substitute aunts are not in a situation of being (possibly) available, since they do not have to merely wait for a need to arise, but instead they are required to continue working at the shelters, and are not able to use their time as if it were free time, or to wait to be called to duty. On the contrary, since they must be available to the employer at all times, the time is effectively work time, and so they are actually working 24 hours a day.

B. The State

⁸ Judgment No. 1082, issued by the Labor Court of the II Judicial Circuit of San José Goigoechea, of May 8, 2003: "... CONSIDERING: VIII) AS REGARDS THE PAYMENT OF FORTY PERCENT CLAIMED FOR AVAILABILITY STATUS: ... This judge questions the forty percent payment claimed, since the disagreement of the appellants has to do with the fact that they are required to remain at the center and are unable to carry out personal and family activities. Whatever percentage is claimed is actually unimportant in view of the statements made by the complainants, because the problem according to this administrator is not solved by payment of an additional percentage of the base wage, since it is clear that the disagreement has to do with the working day and not with the wages."

⁹ Article 137: "Effective work time is the time that workers remain at the orders of the employers and they may not leave the premises where they are working during rest and meal times."

37. On October 14, 2005, the State sent its observations, contending that the substitute aunts who work for PANI had initiated three labor proceedings with the Labor Court of the Second Judicial Circuit, two of which were considered jointly. Decisions have been handed down for both legal actions, which were declared “without merit in all their factual allegations.” These judgments established that under the Labor Law, it is impossible to grant payment for overtime hours to the substitute aunts, since it would imply double payment, as they are paid 25% over their regular wages for the time they are available.

38. The State argues that the substitute aunts’ regime does not violate the principle of equality and nondiscrimination by gender, and considers that it is essential to bear in mind that the exceptional regime instituted for direct care workers or “Substitute Aunts” is based on the legitimate purpose of looking out for the higher interests of children and adolescents in a vulnerable situation.

39. The State goes on to argue that it is fundamental to emphasize in this regard that the complainants, and specifically the petitioner, have not exhausted domestic remedies, since this right has not been alleged as part of the complaints brought before the Constitutional Chamber or any other national court. In this regard, it points out that the constitutional jurisdiction is an expeditious recourse for complaints involving fundamental rights.

40. Moreover, the State maintains that this labor regime does not violate the principle of equality and nondiscrimination by gender, and particularly not with the changes ordered by the Constitutional Chamber and implemented by PANI and the Budget Authority regarding the contracts with said group of workers. In other words, although it is an exceptional regime, the State has assumed that even so, it may not infringe on fundamental liberties and guarantees. One must also not lose sight of the fact that the importance of the work performed by the Substitute Aunts supports the concept of an exceptional regime—provided it does not violate rights—and is consistent with findings of the United Nations Human Rights Commission to the effect that not all differential treatment constitutes discrimination, i.e., “if the criteria for such a differentiation are reasonable and objective, and the end result pursued is a legitimate purpose,” as the petitioner states in her brief. Along the same lines, the State indicates that it is important to note in this case that with due respect for the principle of legality, the relevant processes have taken place in the state institutions, resulting in payment for the hours of availability, in order to ensure that the Substitute Aunts regime, being an exceptional one, meets requirements of rationality.

41. The State insists that the petition of Mrs. Tellez Blanco is without merit, since she has not exhausted domestic remedies, because she did not have recourse to the Constitutional Chamber of the Supreme Court of Justice when both the *amparo* action and the unconstitutionality action were filed. It further states that the petitioner is not a party to either of these two proceedings, and furthermore, the petition lodged with the Commission does not indicate at any point that Mrs. Tellez was a party to any of these proceedings. The State maintains that although the judgments of the Constitutional Chamber of the Court have an *erga omnes* effect, some of the rights claimed by the petitioner were not examined in the *amparo* action, not even in favor of the persons who initiated the action; consequently, the matter remains open for debate in domestic courts.

42. On March 3, 2006, at hearing No. 10 held in the course of the 124th regular session of the Commission, the State repeated its argument that there was no congruence or correlation between the complaints filed domestically in Costa Rica and the petitions lodged with this Commission in the case, and that Mrs. Tellez still has an opportunity to initiate her own *amparo* action and bring her own case.

43. In its communication dated August 11, 2006 (received by the Commission on the 14th of that month), the State writes that the Constitutional Chamber of the Supreme Court of Justice of Costa Rica has established that the important system under which the Substitute Aunts of PANI work is exceptional in nature, especially due to the fact that these workers play a role of the utmost importance for the benefit of minors in a vulnerable situation. It adds that since it has been established that it is an exceptional regime, it should be understood that it does not represent an ordinary work regime due to the need to maintain conditions of stability and security for the benefit of these minors.

44. The State also argues in relation to the second *amparo* action that, since it dealt with labor matters, the Constitutional Chamber referred it to labor courts, so that the allegations could be heard there. It further indicates that the two proceedings initiated in the labor courts are still open, since they are appeals to decisions of the Constitutional Court itself. For this reason, the State insists that domestic remedies have not been exhausted. The State explains that the judicial decisions in question are the ones to determine whether the payment for overtime hours together with the remuneration for availability time should be 40% as claimed, or 25% as originally decided by the Constitutional Chamber.

45. With respect to failure to exhaust domestic remedies, the State draws attention to the fact that the petitions filed domestically have a connotation of remuneration for work, and not of reform of a particular work regime. Therefore, it is of the view that in the petition filed with the Commission, the petitioner is claiming violations of rights other than those referred to in actions brought in national courts. Moreover, Mrs. Tellez Blanco has not aired the situations that are allegedly affecting her adversely in Costa Rican courts.

46. The State contends that in regulating the regime applied to the Aunts by PANI, the government used as a basis the Costa Rican legal system, in an attempt to adapt that exceptional regime to the criteria of rationality and proportionality. It adds that if these criteria are not respected in a specific context, a complaint should be aired in domestic courts, through an *amparo* procedure or an action of unconstitutionality, and that, like any other alleged violation of labor rights, it is the labor courts that are responsible for examining such matters, which is not the procedure followed by the petitioner.

47. Finally, the State expresses an interest in clarifying whether the case in point has to do with the situation of one petitioner, Mrs. Tellez, or if it pertains to the conditions or situation of a group of workers, since in the hearing held on March 3, 2006, during the 124th regular session of the IACHR, the representatives of the victims focused on the situation of Mrs. Tellez with new allegations that the State had no knowledge of and in respect of which, as it stated at the time, there are domestic remedies that Mrs. Tellez has not used, such as an *amparo* petition and recourse to labor courts. For these reasons, the State requests that the petition be declared inadmissible.

IV. ANALYSIS

A. Personal, territorial, temporal, and subject matter jurisdiction of the Inter-American Commission

48. The petitioners are authorized by Article 44 of the American Convention to lodge petitions with the Commission. The petition refers to the specific situation of Mrs. Tellez Blanco, an individual in respect of whom the Costa Rican State has pledged to respect and guarantee the rights established in the American Convention. Moreover, the Commission points out that Costa Rica has been a state party to the American Convention since April 8, 1970, when it deposited its instrument of ratification. Consequently, the Commission has personal jurisdiction to examine the petition.

49. The Commission has territorial jurisdiction to consider the petition, since it alleges violations of rights protected by the American Convention that took place within the territory of a state party to that treaty, i.e., the State of Costa Rica. The IACHR has temporal jurisdiction because the obligation to respect and guarantee the rights protected in the American Convention was already in effect for the State on the date that the acts alleged in the petition occurred. Finally, the Commission has subject matter jurisdiction, because the petition alleges violations of human rights protected by the American Convention.

B. Other requirements for admissibility of the petition

1. Exhaustion of domestic remedies

50. Article 46(1) of the American Convention establishes that in order for a petition lodged with the Inter-American Commission pursuant to Article 44 of the Convention to be admissible, remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to give national authorities an opportunity to examine an alleged violation of a protected right and, if appropriate, to resolve it before such a case is taken to an international entity.

51. The requirement of prior exhaustion applies when remedies are in fact available in the national system, and they are adequate and effective to remedy the alleged violation. In this context, Article 46(2) specifies that the requirement does not apply when the domestic legislation does not afford due process of law for protection of the right in question, or when the alleged victim did not have access to the remedies under domestic law, or when there has been an unwarranted delay in rendering a decision under these remedies. As indicated in Article 31 of the Commission's Rules of Procedure, when the petitioner alleges one of these exceptions, it is up to the State to demonstrate that the remedies under domestic law have not been exhausted, unless that is clearly evident from the record.

52. In the present complaint, the petitioners allege that the remedies of the domestic legal system were exhausted, culminating in the judgment issued by the Constitutional Chamber on July 5, 2002, in response to the *amparo* action brought by the Employees' Union of the *Patronato Nacional de la Infancia*. This is an entity that automatically represents the interests of Mrs. Tellez within Costa Rica, in procuring any type of improvement in working conditions for the group of persons employed as Substitute Aunts by PANI, and is additionally one of the petitioners in the petition filed with the IACHR.

53. For its part, the State argues that domestic remedies were not fully and duly exhausted, because the alleged victim did not participate in all of the petitions and appeals presented on the subject and that furthermore, she did not make a separate declaration of her situation in an *amparo* process, a remedy that the State claims she can still avail herself of. The State adds that domestic remedies have been confined to adjusting the parameters of the working day and due remuneration, and have not included an analysis of the specific case of Mrs. Tellez.

54. Based on the terms of Article 46 of the Convention and Article 31 of the Rules of Procedure, its review of the records, the Commission considers that the resolution of the Constitutional Court exhausts the domestic remedies available to Mrs. Tellez Blanco.

2. Deadline for presentation of petitions

55. Article 32(1) of the Commission's Rules of Procedure establishes that "the Commission shall consider those petitions that are lodged within a period of six months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies."

56. In this case, the petition was lodged on August 24, 2003. It concerned alleged violations of the rights of the alleged victim that began years prior to presentation of the petition; in view of these violations, a motion was filed with the Constitutional Chamber, which issued its judgment on July 5, 2002, notice of which was given on February 24, 2003. Consequently, the Commission considers that the requirement stipulated in Article 32(1) of its Rules of Procedure has been met in this petition, since it was lodged within the established period of time.

3. Duplication of international proceedings and *res judicata*

57. It does not appear from the records that the subject matter of the petition is pending settlement in another international proceeding or that it has been previously decided by this or another international organization. It is therefore appropriate to consider the requirements established in Articles 46(1)(c) and 47(d) of the Convention as having been met.

4. Characterization of the alleged facts

58. It is not incumbent upon the Commission at this stage of the proceedings to decide whether the violations alleged by the alleged victim actually occurred. For admissibility purposes, the Commission must at this stage only decide whether deeds are alleged that, if proven true, could establish violations of the Convention, pursuant to Article 47(b) of the American Convention, and whether the petition is “manifestly groundless” or “obviously out of order” (Article 47.c).

59. The criteria for deciding these two issues differ from those required to pronounce on the merits of a case. The Committee has to make a *prima facie* assessment and determine whether the petition *tends* to establish violation of a right guaranteed by the Convention, not whether it actually establishes said violation. The examination to be conducted at this stage is simply a summary analysis, that does not entail prejudging or issuing an advance opinion on the merits of the case. In establishing two separate stages – admissibility and merits – the Commission’s own Rules of Procedure make a clear distinction between the evaluation the Commission must make in order to declare a petition admissible and the evaluation required to establish a violation.

60. In the instant case, the Commission considers that the arguments adduced by the petitioners regarding a possible violation of Articles 5, 24, and 25 of the American Convention in conjunction with Article 1(1) of the same instrument, to the detriment of the alleged victim, Mrs. Tellez Blanco, are not manifestly groundless.

61. The IACHR considers that the facts presented, if proven in relation to the alleged victim, could establish possible violations of Article 5 of the American Convention in conjunction with Articles 1(1) and 2 of that instrument. The petitioners allege that the working hours said to have been imposed on Mrs. Tellez Blanco harmed her both physically and psychologically, thereby undermining per personal integrity. The reason for all that, according to the petitioners’ arguments, is that the “Aunts” are not given enough rest time outside their workplace after having completed an exhausting day’s work that the Government itself has described as fundamental.¹⁰ In practice, it is argued, the work of each “Aunt” consists of ongoing tasks 24 hours a day, for 11 consecutive days, coupled with the obligation to remain in the workplace throughout that period of time, to look after 10 to 20 children with behavioral, psychological, disability-related, drug-related, sexual, and other problems.

62. Likewise, in respect of the alleged violation of Article 24 of the Convention, the Commission notes that a violation of that Article could be established if it were proven that the workload to which Mrs. Tellez Blanco is subject has a disproportionate impact on women, since only women occupy the “Aunt” positions.

63. As for the alleged violation of Article 25 of the Convention, the Commission observes from the information provided by the petitioners that violation of that Article is alleged not just because the lawsuits resulted in unfavorable judgments in Costa Rican courts, but also on the grounds of the absence of effective protection by the State in respect of the issues raised by several officers in the judiciary (one judge¹¹ and three magistrates)¹².

64. As regards the alleged violation of Articles 11, 17, and 19 of the American Convention, and of Article 7 of the Convention of Belém do Pará, the Commission considers that there are not enough grounds in the presentations of the parties to substantiate violations thereof.

V. CONCLUSION

¹⁰ Communication from the State of Costa Rica received at the IACHR on August 14, 2006.

¹¹ Judgment No. 1082 handed down by the Labor Court of the Second Judicial Circuit of San José Goigoechea, on May 8, 2003.

¹² Dissenting vote of three of the seven magistrates making up the Constitutional Chamber of the Supreme Court of Justice, which handed down Judgment No. 4902-05, of September 5, 1995.

65. The Commission concludes that this petition is admissible and it has jurisdiction to examine the petition filed by the petitioners with regard to the alleged violation of Articles 5, 24 and 25, in accordance with Articles 1(1) and 2 of the American Convention, pursuant to the provisions of Articles 46(1)(c) and (d), 46(2)(c), and 47(b) of that international instrument, and to Articles 28 to 37 and 39 of the Commission's Rules of Procedure.

66. On the basis of the arguments of fact and of law outlined in this report, and without prejudice to the merits of this case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this petition admissible, in relation to Articles 5, 24 and 25, in conjunction with Articles 1(1) and 2 of the American Convention.
2. To declare this petition inadmissible in relation to Articles 11, 17 y 19 of the American Convention and Article 7 of the Convention of Belém do Pará.
3. To notify the State and the petitioners of this decision.
4. To initiate the procedure on the merits of the case.
5. To publish this decision and include it in the Annual Report to be presented to the OAS General Assembly.

Approved by the Inter-American Commission on Human Rights in Washington, D.C., on the 26th day of the month of April 2007. (Signed) Florentín Meléndez President; Paolo Carozza, First Vice President; Victor Abramovich Second Vice President; Commissioners: Sir Clare K. Roberts, Paulo Sérgio Pinheiro, Evelio Fernández Arévalos, and Freddy Gutiérrez.

REASONED VOTE OF COMMISSIONERS PAOLO G. CAROZZA, EVELIO FERNÁNDEZ ARÉVALOS, AND CLARE K. ROBERTS ON ADMISSIBILITY REPORT 29/07

This petition should be declared inadmissible because it does not state facts that tend to establish a violation of the American Convention on Human Rights.

The Petitioners' claim regarding Article 5 of the Convention rests entirely on the unreasonableness of the working hours of the PANI employees and the psychological and physical effects of those hours on the employees. Certainly, there exist international standards on such issues and a system for their international supervision, particularly in the framework of the International Labour Organization. Nevertheless, such issues are beyond the scope of Article 5 of the Convention, which is not intended to govern ordinary labor relations or to impose specific standards on States with respect to employment conditions and working hours in the framework of labor contracts, whether in the public or the private sector. This does not necessarily mean that we would be unwilling to contemplate the application of Article 5 to labor conditions in certain special situations -- for example where specific, extreme working conditions that harm a person's physical, psychological, or moral integrity are coupled with circumstances that make the employment relationship a form of, or analogous to, involuntary servitude. In the case presented here, however, the petitioners have not alleged any facts that present such special circumstances.

Similarly, the facts as alleged could not be grounds to find a violation of Article 24. If the argument of the petitioners is that Ms. Téllez was a victim of discrimination based on the contracting solely of women for the position of Surrogate Aunt, then men would be possible victims of exclusion by not being

permitted access to employment of this type, but it would not constitute the basis for a discrimination claim in the case of Ms. Téllez. To the extent that the petitioners argue instead that that the employment conditions and work hours of Ms. Téllez and other Surrogate Aunts constitute discriminatory treatment against them in comparison to men, again the facts alleged do not support the claim. The petitioners have not alleged facts that would show, statistically or otherwise, such a difference in treatment between men and women in sufficiently comparable situations.

Finally, we do not find that the facts alleged could form the basis for a failure of the State to provide judicial protection of Ms. Téllez's fundamental rights, in accordance with Article 25 of the Convention.