

Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 72/08; Petition 1342-04
Session: Hundred Thirty-Third Regular Session (15 – 31 October 2008)
Title/Style of Cause: Marcio Lapoente da Silveira v. Brazil
Doc. Type: Decision
Decided by: Chairman: Paolo Carozza;
First Vice-Chairwoman: Luz Patricia Mejia Guerrero;
Second Vice-Chairman: Felipe Gonzalez;
Commissioners: Sir Clare K. Roberts, Florentin Melendez, Victor Abramovich.
Pursuant to Article 17(2)(a) of the Rules of Procedure of the IACHR, Commissioner Paulo Sergio Pinheiro, of Brazilian nationality, did not take part in the consideration and adoption of this Report.

Dated: 16 October 2008
Citation: Lapoente da Silveira v. Brazil, Petition 1342-04, Inter-Am. C.H.R., Report No. 72/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 (2008)
Represented by: APPLICANT: Javier Mujica Petit

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I. SUMMARY

1. On December 8, 2004, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition alleging the violation by the Federative Republic of Brazil (hereinafter “Brazil” or “the State”) of Articles I and XVIII of the American Declaration of the Rights and Duties of Man (hereinafter “the American Declaration”), Articles 1(1), 8(1), and 25 of the American Convention on Human Rights (hereinafter “the American Convention”), as well as Articles 1, 6, 8, and 9 of the Inter-American Convention to Prevent and Punish Torture (hereinafter the “Inter-American Convention against Torture ”), to the detriment of Márcio Lapoente da Silveira (hereinafter “the alleged victim”) and his next-of-kin.

2. It is argued that the alleged victim, a cadet in the First Company of the Officer Training Course at the Military Academy of the “Black Needles” (Academia Militar das Agulhas Negras) of the Brazilian Army, located in the mountains of Resende, 150 kilometers from the city of Rio de Janeiro, died on October 9, 1990, as the result of having allegedly been subjected to excessive physical mistreatment. The military investigation opened in relation to the case did not determine who was responsible for his death, and thus has been archived. The civil action for compensatory damages brought on June 25, 1993, by the next-of-kin of the alleged victim has not produced any results to date. Over the course of the proceedings, the petitioners presented arguments and proof primarily relating to the civil judicial proceedings to obtain compensation.

3. On May 5, 2006, the State answered the petition, arguing failure to exhaust domestic remedies, as actions on the matter are pending before the local jurisdiction. It is of the view that the requirements set forth in Articles 46(1)(a) and (b) of the American Convention, and in Articles 31 and 28 of the Commission's Rules of Procedure, have not been met, thus it asks that the petition be declared inadmissible.

4. After analyzing the petition and in keeping with Articles 46 and 47 of the American Convention on Human Rights, as well as Article 30 and related articles of its Rules of Procedure, the Commission decided to find the petition admissible with respect to Articles I and XVIII of the American Declaration, Articles 8(1) and 25 of the American Convention, in connection with Articles 1(1) and 2 of that treaty, as well as Articles 1, 6, 8, and 9 of the Inter-American Convention against Torture. The Commission also decided to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BEFORE THE COMMISSION

5. The original petition was received by the Commission on December 8, 2004. On December 8, 2005, the petitioners were informed that, in keeping with Article 26 of the Commission's Rules of Procedure, it was not possible to process the petition, as it did not meet the requirements for doing so, and as it was not submitted in timely fashion.

6. On December 22, 2005, the petitioners submitted information in which they stated that since what was before the domestic jurisdiction was a proceeding for civil compensation brought by the next-of-kin of the alleged victim against the State, and one of the perpetrators of the mistreatment that caused the death of the alleged victim, the petition was filed within the applicable time.

7. On January 27, 2006, the petition was transmitted to the State for it to respond within two months, counted from February 3, 2005, in keeping with Article 30(3) of the Commission's Rules of Procedure. On February 16, 2006, the State requested a 30-day extension for answering the petition, which was granted on February 28, 2006, and it was so informed.

8. On May 5, 2006, the State answered the petition; the acknowledgement of receipt of the answer was sent out on May 10, 2006. That same day, the information was transmitted to the petitioner, which was given one month to submit its observations. On May 23, 2006, the State submitted the annexes of its previously submitted answer.

9. The petitioners submitted additional information on June 12, 2006. On June 13, 2006, Joss Opie, one of the signatories of the original petition and representative of the alleged victim's family, submitted a communication disputing the contents of the observations submitted on June 12, 2006 by the organization Justiça Global, and therefore requested that they not be forwarded to the State.

10. On June 19, 2006, Joss Opie submitted powers-of-attorney granted to him by Sebastião Alves da Silveira and Carmen Lucia Lapoente da Silveira, the alleged victim's parents. Together

with this information, he submitted observations on the State's response, along with additional information.

11. On June 29, 2006, the organization Justiça Global filed a note in which it withdrew as a petitioner, which was duly notified to the State. On July 24, 2006, the petitioner submitted information indicating that the Centro de Asesoría Legal del Perú (CEDAL), represented by Javier Mujica Petit, was joining as co-petitioner.

12. The petitioners also submitted additional information on November 17, 2006, February 20, 2007, June 27, 2007 and August 31, 2007, and July 31, 2008. The communications dealing with additional information or arguments were duly transmitted to the State.

13. Likewise, the State presented additional information on September 6, 2006, September 7, 2006, April 23, 2007, and June 27, 2007. These were duly transmitted to the petitioners.

III. THE PARTIES' POSITIONS

A. The petitioners' position

14. The petitioners argue that State military officials tortured the alleged victim and caused his death, on October 9, 1990. According to them, at the time of his death, the presumed victim was 18 years of age and a cadet in the Brazilian army. The facts, it is argued, constitute violations of the rights enshrined in Articles I and XVIII of the American Declaration of the Rights and Duties of Man, Articles 1(1), 8(1) and 25 of the American Convention, and Articles 1, 6, 8, and 9 of the Inter-American Convention against Torture.

15. According to the petitioners, agents of the Brazilian State tortured the alleged victim, causing his death by acts and omissions, when he was under their jurisdiction, with which they violated the provisions cited supra. In addition, it is argued that the State did not adequately fulfill its duty to investigate the facts, as required by the above-referenced provisions, failing to identify or punish the persons responsible, and failing to provide reparations to the alleged victim's next-of-kin.

16. In keeping with what is stated, the petitioners ask that given the inoperativeness of justice and of the failure of the competent authorities to prevent the violations, investigate the facts, identify and punish the persons responsible, and pay compensation to the victims, the petition be found admissible, in keeping with Article 46 of the American Convention.

17. The petitioners describe a pattern of cases of torture suffered by conscripts of the Brazilian Armed Forces and the State's subsequent failure to investigate and punish such acts, which, they state, were the subject of reports by several non-governmental organizations.

18. The alleged victim, the petitioners adduce, was an 18-year-old youth, a cadet in the First Company of the Officer Training Course of the Military Academy of the "Black Needles" of the Brazilian Army (Academia Militar das Agulhas Negras, hereinafter "AMAN"), an elite academy of the state force located in the mountains of Resende, 150 km from Rio de Janeiro. At this

academy, according to them, a four-year course is offered that involves military and academic training, for which the participants are selected by a national competitive exam. They adduce that the candidates are subjected to rigorous physical tests, as well as academic and medical exams; those subjected to these exams and tests must have a high level of physical and intellectual training. They state that after that they are highly esteemed in the Army, and in society at large.

19. According to the petitioners, on October 9, 1990, at approximately 4:50 a.m., 283 cadets of the First and Third Companies met for physical training, along with 12 instructors, all officers of the AMAN. The cadets had to participate in Jungle Operations and Special Techniques training, the first part consisting of a quick march along a dirt road that connects the Special Instruction Section with the Special Instruction Area.

20. It is noted that the cadets had approximately 30 minutes to complete the drill, in military formation, carrying nearly five kilograms of equipment. The march began at approximately 5:15 a.m., and was led by Lt. Antonio Carlos de Pessoa, who was accompanied by an ambulance and two physicians. According to the petitioners, the temperature was 18 degrees Celsius, with relative humidity of 75%; many of the cadets fell behind, some were unable to complete the exercise. One of them, Marcelo Lopes de Andrade, suffered hypoglycemia and had to be taken to the hospital in an ambulance.

21. According to the petitioners, after the transfer of cadet Andrade, the alleged victim began to feel ill. At 5:50 a.m., when the head of the march reached the destination, Lt. Antonio Carlos de Pessoa noted that the alleged victim and other cadets had not arrived, so he retraced his steps and came upon three cadets carrying the alleged victim, accompanied by another 15 conscripts. Instead of allowing the cadets to continue carrying the alleged victim, Lt. Pessoa ordered that they set him on the ground and continue marching to the destination. Even though the alleged victim was in poor physical condition, the Lieutenant ordered him to continue marching, and struck him in the face, in addition to kicking him in the abdomen, legs, and buttocks. Under this pressure, it is argued that the alleged victim was able to get up and continue the march to the end, arriving at approximately 6:00 a.m., where, according to witnesses, he did not receive any assistance, medical or otherwise.

22. The petitioners allege that the second part of the exercise began at 6:30 a.m.; the cadets had to run up and down a 50 meter ramp until the officers ordered them to stop, and then had to present themselves to do push-ups and other leg exercises. After they had gone back and forth on the ramp five times, the order to stop was given. It is indicated that the alleged victim was extremely tired and disoriented, and fell down several times during the exercise, as a result of which he had to be helped by his fellow conscripts. Despite his poor condition, he was able to complete the drill. It is argued that during the push-ups the alleged victim lost consciousness and fell on the ground, where he was kicked by Lt. Pessoa, and insulted by him; Lt. Pessoa also poured water on him and threw dirt at him. As he remained inert, the superior became upset and began to kick him again. It is noted that several high-ranking officers witnessed the episode.

23. According to the petitioners, a Captain Leal approached and, even though the alleged victim was unconscious, ordered him to get up. As he did not respond, he ordered that he be examined by a physician, who removed the alleged victim's gear, leaving him lying on the

ground so as to attend to other cadets who also felt ill. It is adduced that suddenly the alleged victim regained consciousness, and when asked by his superiors what was happening to him, he answered that he didn't feel well, as a result of which he was subjected to ridicule by several high-ranking officers. It is noted that after approximately 30 minutes, an ambulance arrived, and that the alleged victim had worsened, as he was beginning to suffer convulsions; the physicians gave him an injection of glucose, and then left him lying on the ground again; after seeing that after some time he didn't improve, they decided to take him to the first aid facility at approximately 7:30 a.m., where little could be done for him, given the lack of equipment.

24. The petitioners allege that between 8:30 a.m. and 9:00 a.m. the alleged victim was taken to the Unit's main health facility, under the charge of First Lt. Dr. Marcelo Antonio Paulino, who was given information on how he had reached that condition; he was given analgesics by injection, after which it was found that he was suffering from a high fever and was not responding to stimuli. It is argued that at approximately 11:00 a.m., a physician diagnosed meningitis; it was then decided, after approximately one hour of discussion among the professionals who examined him that he should be transferred to the Army's Central Military Hospital, located approximately 150 kilometers from the Unit, in the city of Rio de Janeiro. The petitioners argue that during this trip the alleged victim began to become cyanotic, and then stopped breathing. When the ambulance reached the Military Hospital, at 2:00 p.m., the alleged victim had died.

25. The petitioners allege that the Director of the Military Hospital ordered that an autopsy be performed on the deceased; the autopsy report was not given to the next-of-kin of the alleged victim until November 23, 1990; the experts concluded that the alleged victim died as the result of thermal shock caused by physical exercise, followed by a heart attack. It is argued that the autopsy report detailed only some of the injuries suffered by the alleged victim, without indicating how they were caused.

26. It is argued by the petitioner that the parents of the alleged victim reached the hospital at approximately 2:15 p.m.; when they consulted officials, they were told they could not see their son given the presumed symptoms of meningitis; after waiting a few moments they were informed that he had died, and that an autopsy would be performed at 5:00 p.m. The petitioners argue that the autopsy was not performed until 7:00 p.m.; once it was completed, the physician who performed it told the father that the hypothesis of meningitis was discarded, that they could not yet specify the causes of death. After some family members viewed the corpse, they said they noted serious injuries from blows.

27. The petitioners allege that the parents of the alleged victim received expressions of solidarity from the parents of other cadets subjected to the training as a result of which their son died; moreover, the case was publicized by several local media, leading the parents to receive threats aimed at getting them to keep silent.

28. It is argued by the petitioners that in 1996 the alleged victim's parents contacted the anti-torture organization Grupo Tortura Nunca Mais, who put them in touch with Dr. Nelson Massini, who agreed to analyze the remains of the deceased for signs of torture, but ultimately he declined to prepare a report.

29. According to the petitioners, during the investigations and judicial proceedings, the units of the Brazilian Army involved refused to provide information on the facts. In addition, they allege that a campaign of intimidation was waged against the alleged victim's parents, to keep them from publicizing the situation. This circumstance kept civil society organizations from supporting them in the judicial proceeding.

30. The petitioners also provide a description of the system for investigating and prosecuting punishable acts in the context of the Brazilian Armed Forces. Specifically, they argue that on October 10, 1990, an administrative proceeding was instituted into the circumstances that led to the death of the alleged victim; the investigations themselves began on November 16, 1990. These concluded that the death was caused by thermal shock, followed by acute myocardium infarction, during physical exercise, there being no other internal or external cause of death.

31. The petitioners allege that it was indicated that the body showed no signs that the alleged victim had been subjected to physical violence or mistreatment, or that he suffered any preexisting medical condition, so that the death in the transfer to the hospital could not have been avoided in any way. Accordingly, it was adduced in the examination that the circumstances surrounding the death of the alleged victim did not indicate that a military or common crime was committed; rather, Lt. Pessoa was found to have committed a disciplinary infraction, for which he was to be admonished by his superior.

32. On the investigation and prosecution of the causes leading to the death of the alleged victim, the petitioners argue that the military investigation was concluded on December 5, 1990, so as to then be transferred to the Military Public Ministry (MPM), which indicted Lt. Antonio Carlos de Pessoa of the criminal act defined at Article 175 of the Military Criminal Code (violence against a subordinate), while physicians Alexandre Taveira Fontes and Darci Ricardo Ramos were indicted for abandonment, conduct provided for in Article 212 of the same instrument.

33. The petitioners indicate that the military tribunal that judged the case found the existence of several irregularities in the evidence presented. In addition, the petitioners allege that the NGO Grupo Tortura Nunca Mais requested an evaluation of the expert medical report, in which it was concluded that there was a clear inconsistency in the determination of the autopsy.

34. The petitioners state that on April 22, 1992, the military tribunal acquitted the accused, with dissenting votes by some members. The Military Public Prosecutor appealed the decision in relation to Lt. Pessoa, and it was overturned by the Superior Military Tribunal, which convicted him and sentenced him to a 3 (three) months prison sentence, but it decided to suspend enforcement of the judgment for 2 (two) years. In addition, the petitioners adduce that the Superior Military Tribunal decided to carry out a new investigation into the facts, which did not turn up anything; so it was ordered archived on June 15, 1994.[FN2]

[FN2] The assertion of this date is affirmed by the petitioners in the petition.

35. The petitioners adduce that after the Superior Military Tribunal handed down its decision in 1992, the alleged victim's parents began an intense campaign seeking to have the investigations reopened to determine who was liable for the death of their son, for which they took recourse to a number of communications media, as well as the authorities, without any effect.

36. According to the petitioners, simultaneously with the criminal proceedings before military courts, on June 25, 1993, the alleged victim's next-of-kin filed civil action for compensation No. 9300.137.840 against the Federal Government of Brazil and Lt. Pessoa, in which a decision was handed down on November 13, 2000 by the 16th Federal District Court of Rio de Janeiro. In this decision, the charges against Lt. Pessoa were dismissed without examining the merits of the allegations; nonetheless, the State was held liable, but only for the payment of the funeral expenses and procedural costs. The petitioners argue that the next-of-kin who filed the action, on the other hand, were ordered to pay the procedural costs for Lt. Pessoa's defense.

37. On December 18, 2000, the next-of-kin filed an appeal against the decision in question, which was tried, after being redistributed four times, on March 30, 2006 by the superior court – Regional Federal Court of the Second Region (Tribunal Regional Federal da Segunda Região – hereinafter “TRF”)[FN3], which ordered that the Federal Government pay the alleged victim's family the amount of the monthly wages that a Second Lieutenant of the Army would receive until the age of 71 years, in addition to all the sums that would have been received by the deceased until the first month of retirement, with interest, and adjusted based on any monetary devaluation from the moment of the facts. In addition, the State was ordered to pay court costs and attorney's fees.[FN4] The TRF also decided to again include Lt. Pessoa as a defendant in the civil action for compensatory damages.

[FN3] The Regional Federal Court of the Second Region has jurisdiction over Rio de Janeiro and Espírito Santo states.

[FN4] As appears in the publication of the Justice Digest of April 18, 2006, attached as an annex to the information submitted on June 19, 2006.

38. The petitioners observe that three new remedies were pursued against that decision of the TRF. On April 25, 2007, the next-of-kin of the alleged victim filed for an embargo declaratório [clarifying order][FN5] to clarify the terms of the judgment as to how the stipulated benefits would be calculated. The Union and Lt. Pessoa each filed an agravo interno [lower court error] action[FN6] to have the judgment of March 30, 2006 set aside.

[FN5] Civil Procedural Code of the Federative Republic of Brazil, Article 535. “The embargo declaratorio [clarifying order] is allowed where: I – there is obscurity or contradiction in the judgment issued by the judge or higher court; II – there is omission of a point that ought to have been addressed by the judge or court.” [free translation of the Portuguese original].

[FN6] An agravo interno [lower court error] action may be brought against an individual (“monocratic”) decision of the relator [judge selected by lottery to interpret a case to be tried in a court of which he is a member] in actions brought within the jurisdiction of the courts themselves, whose internal rules of procedure establish the procedure and other details of this remedy.

39. On November 22, 2006, the Seventh Specialized Chamber of the TRF rejected the actions brought by the defendants and admitted the appeal brought by the alleged victim’s next-of-kin, upholding the decision of March 30, 2006.

40. On January 15, 2007, Lt. Pessoa filed a recurso especial[FN7] [special remedy] against the decision of the court of second instance for consideration by the Higher Court of Justice (Superior Tribunal de Justiça – hereinafter “STJ”), alleging violation of federal laws and requesting his exclusion as a defendant.

[FN7] 1988 Constitution of the Federative Republic of Brazil, Article 105. “It is incumbent upon the Higher Court of Justice: (...) III – to adjudicate in a recurso especial [special action] cases decided, in the only or final instance, by the Regional Federal Courts or the courts of the states, the Federal District and the territories, when the decision challenged (a) violates a treaty or federal law, or negates its effectiveness; (...) (c) interprets a federal law differently from its interpretation by another court.” [free translation of the Portuguese original].

41. On February 27, 2007, the Federal Union also brought a recurso especial against the judgment of the second tier court. In said appeal, it was argued that the judgment violated federal laws and that it was not incumbent upon the Union to indemnify the alleged victim’s next-of-kin.

42. On June 29, 2007, the next-of-kin of the alleged victim also challenged the judgment of November 22, 2006, alleging that the decision violated constitutional provisions. Accordingly, they filed a recurso extraordinario [extraordinary action][FN8], for adjudication by the Federal Supreme Court (Superior Tribunal Federal – hereinafter “STF”), which seeks an increase in the amount of compensation to be paid by the Union for moral damages.

[FN8] 1988 Constitution of the Federative Republic of Brazil, Article 102: “It is incumbent upon the Federal Supreme Court: (...) III – to adjudicate in a recurso extraordinario [extraordinary action] cases decided, in the only or final instance, when the decision challenged (a) contradicts a provision of this Constitution; (...)”.[free translation of the Portuguese original].

43. The petitioners report that Marcio Lapoente’s next-of-kin have now submitted their counterarguments in the two actions brought by the defendants. Also awaited is the prior analysis of the admissibility by the TRF of the three remedies and, if found admissible, referral of the actions to the higher courts for consideration of the merits.

44. The petitioners state that all domestic remedies have been exhausted in relation to the investigation and prosecution for criminal liability, there being an unwarranted delay in relation to the proceeding for civil compensation, thus the exception provided for in the Convention for admissibility of the petition applies, and they ask that it be considered admissible.

B. The State's position

45. The State, on May 5, 2006, answered the petition indicating that the admissibility requirements in the American Convention had not been met, for when the petition was filed the appeal brought against the proceeding for civil damages was before the Court of Appeals. It adduces that a series of remedies[FN9] are available in the context of the domestic legislation on civil procedure against the decision of the Court of Appeals that are effective for making reparation for the alleged violations, in the domestic jurisdiction, thus the claim cannot yet be admitted before the inter-American system.

[FN9] Note from the State No.149 of May 5, 2006. According to the State, the available remedies are: (1) recurso de embargos de divergência [order for consistency], Articles 530 to 534 of the Civil Procedural Code; (2) recurso de agravo [lower court error] within a period of five days to guarantee the admissibility and consideration of the merits of said orders; (3) recurso especial [special recourse] to the Higher Court of Justice and recurso extraordinario [extraordinary recourse] to the Federal Supreme Court, within 15 days, Article 508 of the Civil Procedural Code; (4) agravo de instrumento, [appeal against an interlocutory decision] regarding decisions in the remedies mentioned in numeral (3), within a period of 10 days; (5) recurso de agravo, [lower court error] regarding decisions regarding the agravo de instrumento, within a period of five days; and (6) embargos divergentes [order for consistency] regarding the pronouncements of the Higher Court of Justice in connection with the recurso especial, and the Federal Supreme Court in connection with the recurso extraordinário.

46. The State indicates that the time taken to process the civil action is justified by the observation of the principle of adversality and due process of law, emphasizing that the decision of the court of first instance, and even those in the appeals, have already been issued. Therefore, the petition does not meet the requirement enshrined in Article 46(1)(a).

47. Additionally, the State argues that the requirement provided for in Article 46(1)(b) of the American Convention has not been met by the petition either. The State adds that the petitioners' arguments regarding unwarranted delay, related to the exception of Article 46(2)(c) of the Convention, are unfounded. The State emphasizes that the alleged facts of torture and failure to provide assistance occurred on October 9, 1990, and the matter of the alleged flaws in the police investigation and of due process was declared closed in June 1994.

48. Specifically with regard to the military criminal jurisdiction, the State argues that one day after the death of the alleged victim, i.e., Mr. Lapoente, an administrative investigation was launched into the circumstances of his death and 45 (forty-five) days later, the military criminal

investigation was launched. The State indicates that the investigation orders were forwarded to the Office of the Military Attorney General, which reported Lt. Pessoa for violence against an inferior,[FN10] and physicians Ramos and Taveira for neglect of duties.[FN11] The case was then submitted to the military court of first instance – Conselho de Justiça – which, on April 22, 1992, acquitted the defendants by a vote of the majority of its members. The State adds that the Office of the Military Attorney General appealed said decision in connection with the acquittal of Lt. Pessoa, which led the Supreme Military Court to amend the decision to acquit.

[FN10] Note from the State No. 285 of September 5, 2006. In its communication, the State indicates that said offense is defined in Article 175 of the Military Penal Code.

[FN11] Note from the State No. 285 of September 5, 2006. In its communication, the State indicates that said offense is defined in Article 212 of the Military Penal Code.

49. In addition, the State adduces that considering when the decision before the criminal jurisdiction that absolved Lt. Pessoa in 1992 became *res judicata*, and the archiving of the investigation for lack of evidence reopened in 1994 to find the alleged responsibility for the events that occurred at the AMAN, brings to the conclusion that the petition was filed after the time period established in Article 46(1)(b) of the Convention.

50. The State argues that in the domestic jurisdiction, the criminal case unfolded with due process of law; it had concluded 14 years before the petition was filed. The State also adduces that all the non-judicial remedies pursued by the alleged victim's next-of-kin before several forums, including the press, are ineffective for determining that the petition has been filed within the time established in the Convention as an admissibility requirement, all of which require that it be found inadmissible, pursuant to Article 46(1)(a) and (b) of the American Convention and Article 32(1) of the Commission's Rules of Procedure.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence of the Commission *rationae personae*, *rationae loci*, *rationae temporis*, and *rationae materiae*

51. The petitioners are authorized by Article 44 of the American Convention to file complaints before the IACHR. The petition indicates as the alleged victim Márcio Lapoente da Silveira, a citizen of the State, therefore, the Commission is competent *rationae personae* to examine the petition.

52. The Commission is competent *rationae temporis* insofar as the obligation to respect and ensure the internationally protected rights was already in effect for Brazil as of the date the facts are alleged to have occurred, whether under the American Declaration, the American Convention, or the Inter-American Convention against Torture.[FN12]

[FN12] Ratified by Brazil on July 20, 1989.

53. The Commission has competence *ratione loci* to consider this petition since it refers to alleged violations of rights protected by the American Declaration, the American Convention, and the Inter-American Convention against Torture that took place in the territory of a State Party to said instruments.

54. The Commission clarifies that some of the facts argued to be in violation of the human rights of the alleged victim and his next-of-kin began prior to September 25, 1992, the date Brazil ratified the American Convention; accordingly, one of the sources of law applicable in this respect is the American Declaration. Both the Court and the Commission have found that the American Declaration is a source of international obligations for the Member States of the OAS, prior to and in the absence of ratification of the American Convention by such Member State.[FN13]

[FN13] See I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A and B No. 10, paras. 35-45; IACHR, James Terry Roach and Jay Pinkerton v. United States, Res. 3/87, Case 9,647, September 22, 1987, ANNUAL REPORT 1986-87, paras. 46-49, Rafael Ferrer-Mazorra et al. v. United States, Report No. 51/01, Case 9,903, April 4, 2001. See the Statute of the IACHR, Article 20. Report No. 119/01. Case 11,500, October 16, 2001, para. 37.

55. Finally, the Commission is competent *ratione materiae*, because the petition alleges violation of human rights protected by the American Declaration, the American Convention, and the Inter-American Convention against Torture.

B. Admissibility Requirements

1. Exhaustion of domestic remedies

56. Article 46(1) of the American Convention establishes as an admissibility requirement of a claim that the domestic remedies available in the State must first be exhausted, in keeping with generally recognized principles of international law.

57. Article 46(2) establishes that the provisions in relation to exhaustion of domestic remedies shall not apply when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

58. The petitioners have noted that the complaint is based on the death, preceded by mistreatment and practices of torture, of the alleged victim, and on the ineffectiveness of the judicial bodies for resolving the remedies pursued before them. In that sense, the complaint also refers to the military criminal jurisdiction, but mostly and primarily to the alleged delay in the procedure before the civil jurisdiction.

59. The State raised the objection of failure to exhaust domestic remedies regarding the civil jurisdiction, under the argument that the appeal brought against the ruling handed down in the civil action for compensation is following its regular course, and that a series of domestic remedies may be brought against the decision to be issued in that case, which may prove effective for reestablishing the rights said to have been violated in the domestic jurisdiction.

60. First of all, the Commission points out that the prior exhaustion requirement is applied when adequate and effective remedies are actually available in the domestic system to remedy the alleged violation. In this regard, Article 46(2)(a) of the American Convention stipulates that such requirement “shall not be applicable when the domestic legislation of the State does not afford due process of law for the protection of the right or rights that have allegedly been violated”.

61. In line with the foregoing, the Commission must first analyze the criminal case pursued within the military justice system, with regard to the exhaustion of domestic remedies. It is undisputed that the facts of the present case were investigated by means of a military investigation (*supra* paras. 32 and 48). It is also undisputed that the case was then prosecuted before a military court of first instance (Conselho de Justiça), followed by an appeal before the Supreme Military Court (Superior Tribunal Militar) (*supra* paras. 34 and 48). Both parties agree that the military criminal investigation was archived in June of 1994 (*supra* paras. 34 and 49).[FN14]

[FN14] On the matter referred to *supra*, this organ has already considered, on previous occasions, that in Brazil the archiving of a police investigation (Inquérito Policial) is definitive; since no appeal may be pursued against such a decision (See, *inter alia*, IACHR, Report No. 41/07, Petition 998-05, Admissibility, Lazineo Brambilla da Silva, Brazil, July 23, 2007, paras. 57 and 58; IACHR, Report No. 80/05, Case 12.397, Inadmissibility, Hélio Bicudo, Brazil, October 24, 2005, para. 27; IACHR, Report No. 37/02, Admissibility, Case 12,001, Simone André Diniz, Brazil, October 9, 2002, paras. 25 to 27).

62. The Commission observes that the petitioners have not presented elements or evidence that might allow it to examine in depth potential deficiencies in the military investigation or in the military criminal procedure related to the alleged victim’s death. The State, on its part, argued that the criminal case before the military jurisdiction unfolded with due process of law (*supra* para. 50).

63. Nevertheless, the Commission observes that the facts alleged in this complaint refer to torture and mistreatment which would have resulted in the alleged victim's death during military training at the AMAN. The Commission notes that, at the admissibility stage, it must not make a determination regarding the merits of the petition. However, taking into account the facts alleged, the Commission must make a determination of whether the procedure pursued before the military jurisdiction afforded due process of law for the protection of the rights allegedly violated, in conformity with Article 46(2)(a) of the American Convention.

64. In this regard, the Commission reiterates that the rights allegedly violated to the detriment of Márcio Lapoente da Silveira include the right to life and the right to humane treatment, in the context of allegations of torture which led to his death. The IACHR has long held that military justice systems in general (investigations and trials) have been considered to be ineffective remedies to address human rights violations, thus those with access only to the military justice system have not necessarily been required to exhaust domestic remedies before submitting cases to the Commission (*infra paras. 66-72*).

65. The same reasoning has been constantly applied by other relevant international human rights bodies. For instance, within the United Nations system, in 1995, the United Nations Special Rapporteur on Torture affirmed that, "military tribunals should not be used to try persons accused of torture [...] Complaints about torture should be dealt with immediately and should be investigated by an independent authority with no relation to that which is investigating or prosecuting the case against the alleged victim." [FN15] Similarly, in 2000, the Working Group on the Administration of Justice created under the Sub-Commission on the Promotion and Protection of Human Rights started a study on 'administration of justice through military tribunals and other exceptional jurisdictions,' which concluded in 2002 that, "in all circumstances, the competence of military tribunals should be abolished in favor of those of the ordinary courts, for trying persons responsible for serious human rights violations, such as extrajudicial executions, enforced disappearances, torture and so on." [FN16]

[FN15] 1995 Report, Special Rapporteur on Torture. U.N. Doc. E/CN.4/1995/34, 2 January 1995, para. 76(g).

[FN16] See U.N. Doc. E/CN.4/Sub.2/2000/44, 15 August 2000, para. 30.

66. Specifically with regard to Brazil and the inter-American human rights system, the Commission has, since 1997, recommended that, the State "confer[] on the ordinary justice system the authority to judge all crimes committed by members of the state 'military' police." [FN17] The aforementioned recommendation was aimed at the application of the military justice system to the military police in Brazil; however, the same can be said regarding the Armed Forces. Indeed, at that opportunity, the Commission found undeniable evidence that, in Brazil, "the [military] courts tend[ed] to be indulgent with [personnel] accused of human rights abuses and other criminal offenses, thereby allowing the guilty to go unpunished." [FN18]

[FN17] IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL, OEA/Ser.L/V/II.97, Doc. 29 rev. 1, Chapter III (29 September 1997), para. 95(i).

[FN18] IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL, OEA/Ser.L/V/II.97, Doc. 29 rev. 1, Chapter III (29 September 1997, para. 77.

67. This position of the Commission has been pervasive and applies to all Member States of the Organization of American States. In this regard, in 1993, the Commission recommended to all Member States that, “under no circumstances are military courts to be permitted to sit in judgment of human rights violations.”[FN19] Similarly, in 1994, the IACHR recommended that, “all cases of human rights violations must therefore be submitted to the ordinary courts.”[FN20] In 1998, the Commission reaffirmed that, “in any case, this special jurisdiction must exclude the crimes against humanity and human rights violations.”[FN21]

[FN19] IACHR, ANNUAL REPORT 1992-1993, OEA/Ser.L/V/II.83 Doc. 14 (12 March 1993), Chapter V(VII), para. 6.

[FN20] IACHR, ANNUAL REPORT 1993, OEA/Ser.L/V/II.85 Doc. 8 rev. (11 February 1994), Chapter V(IV), Final Recommendations, para. 4.

[FN21] IACHR, ANNUAL REPORT 1997, OEA/Ser.L/V/II.98 Doc. 6 (17 February 1998), Chapter VII, para. 1 (emphasis added).

68. The Commission has dealt with the issue of military jurisdiction in Brazil in several admissibility (and merits) decisions in the past few years. Upon deciding the admissibility of a case regarding Brazil (11.517, Diniz Bento da Silva), in 2002, the Commission stated the following:

Regarding the inquiry carried out by the military, the Commission has firmly established jurisprudence that [the trial of] human rights violations [] by the military justice system does not constitute an adequate remedy, thus the petitioners were not obliged to exhaust domestic remedies under military jurisdiction.[FN22]

[FN22] IACHR, Case 11.517, Report No. 23/02, February 28, 2002, para. 25.

69. Along the same lines, in its admissibility decision regarding Case 11.820 (Eldorado dos Carajás), in 2003, the IACHR concluded that, “the Commission does not consider the military [] to have the independence and autonomy needed to impartially investigate alleged violations of human rights allegedly carried out by [the] military [].”[FN23] Indeed, the IACHR stressed that the investigation of human rights violations by the military courts itself entailed problems, and asserted that:

When the military justice system conducts the investigation of a case, the possibility of an objective and independent investigation by judicial authorities which do not form part of the

military hierarchy is precluded. Thus, when an investigation is initiated in the military justice system, a conviction will probably be impossible even if the case is later transferred to the civil justice system. The military authorities will probably not have gathered the necessary evidence in an effective and timely manner. In those cases which remain in the military justice system, the investigation will frequently be conducted in such a manner as to prevent the case from reaching the final decision stage.[FN24]

[FN23] IACHR, Case 11.820, Report No. 4/03, February 20, 2003, para. 27.

[FN24] IACHR, Case 11.820, Report No. 4/03, February 20, 2003, para. 28.

70. In the admissibility decision of the Case Eldorado de Carajás, then, the Commission concluded that, “Brazilian law does not provide the due process necessary for the effective investigation of alleged human rights violations perpetrated by [the] military [].”[FN25] Therefore, domestic remedies need not be exhausted because “although formally there does exist a remedy in Brazil for investigating human rights violations by [the] military [], the power that Brazilian law grants to the military [] itself to investigate such violations in practice constitutes a legal ground that prevents said remedies being exhausted, for lack of the requisite due process.”[FN26]

[FN25] IACHR, Case 11.820, Report No. 4/03, February 20, 2003, para. 32.

[FN26] IACHR, Case 11.820, Report No. 4/03, February 20, 2003, para. 31.

71. In another decision published in 2003 (Case Parque São Lucas), regarding allegations of violations of the right to life and personal integrity, the Commission condemned again the broad competence of military jurisdiction in Brazil, in the following terms:

As a corollary, a military court or tribunal that acts as judge and party in the trial of common crimes committed by the members of the military police cannot offer the necessary guarantees for ensuring the exercise of those rights for the victims and their next-of-kin.[FN27]

[FN27] IACHR, Case 10.301, Report 40/03, October 8, 2003, para. 63.

72. Lastly, on this point, the Commission mentions its 2004 decision in Case 11.556 (Corumbiara), also related to allegations of torture, among other violations, in which it ratified its understanding that the scope of military justice, including the investigations, needed to be restricted and necessarily exclude human rights violations, as follows:

[...] Human rights violations must be investigated, tried, and punished according to the law by ordinary criminal courts. The inversion of jurisdiction with this regard shall be prohibited, because it undermines the judicial guarantees through a false façade of efficiency, which has

serious institutional consequences and in fact puts the ordinary courts and the rule of law into question.[FN28]

[FN28] IACHR, Case 11.556, Report No. 32/04, March 11, 2004, para. 265.

73. Based on the foregoing, the Commission finds that, by submitting the alleged human rights violations related to the mistreatment, torture and subsequent death of the alleged victim to the military justice system, the Brazilian legislation did not afford due process of law for the protection of the rights that have allegedly been violated. Therefore, the Commission concludes that this situation falls within the exception to the rule of prior exhaustion of domestic remedies under Article 46(2)(a) of the American Convention.

74. The Commission is mindful that the petitioners also argued the exception contemplated in Article 46(2)(c), as it relates to the allegedly unwarranted delay in the civil proceedings for compensation, since a final decision has been pending for almost 15 (fifteen) years (*supra* párr. 58). However, having already concluded *supra*, that this case presents an exception to the rule of prior exhaustion of domestic remedies, the Commission does not consider it necessary to examine such arguments with regard to the exhaustion of domestic remedies.

75. Lastly, it should be noted that invoking the exceptions to the rule of exhaustion of domestic remedies provided for in Article 46(2) of the American Convention is closely linked to determining possible violations of certain rights enshrined therein, such as the guarantees of access to justice and, in this particular case, the duty to give domestic effect to the provisions of the American Convention, since the submission of the criminal case to the military jurisdiction was done in accordance with the domestic law in force. Nonetheless, Article 46(2) of the American Convention, by its nature and purpose, has its own autonomous content, *vis-à-vis* the substantive norms of the Convention. Therefore, the determination as to whether the exceptions to the prior exhaustion rule provided for in that provision apply to the instant case must be made prior to and separate from the analysis of the merits, since it depends on a standard of appreciation different from that used to determine the violation of Articles 8 and 25 of the American Convention, in relation to articles 1(1) and 2 of that instrument.[FN29] It should be noted that the domestic legislation that caused the existing remedies to “not afford due process of law,” in line with Article 46(2)(a) of the Convention will be analyzed, as pertinent, in the report the Commission adopts on the merits, so as to determine whether, in effect, they constitute violations of the American Convention.

[FN29] IACHR, Report N° 19/07, Petition 170-02, Admissibility, Ariomar Oliveira Rocha, Ademir Federicci, and Natur de Assis Filho, Brazil, March 3, 2007, para. 27; Report N° 23/07, Petition 435-2006, Admissibility, Eduardo José Landaeta Mejía and Others, Venezuela, March 9, 2007, para. 47; Report N° 40/07, Petition 665-05, Admissibility, Alan Felipe da Silva, Leonardo Santos da Silva, Rodrigo da Guia Martins Figueiro Tavares, and Others, Brazil, July 23, 2007, para. 55.

76. Based on the foregoing, the Commission concludes that this complaint is admissible, in conformity with Article 46(2)(a) of the American Convention.

2. Deadline for lodging a petition

77. Article 32(2) of the Commission's Rules of Procedure provides:

In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

78. In the circumstances of this case, the Commission ruled *supra* (para. 76) on the applicability to these facts of an exception to the prior exhaustion rule. Accordingly, the Inter-American Commission must determine whether the petition was submitted within a reasonable time, as per Article 32(2) of the Rules of Procedure.

79. In this regard, the Commission notes that the alleged torture followed by death of the presumed victim took place on October 9, 1990. It is undisputed that, a criminal investigation and criminal procedure before the military jurisdiction followed, and it was eventually archived in June of 1994 (*supra* paras. 34 and 49). It is also undisputed that, simultaneously with then ongoing criminal proceedings before military courts, the alleged victim's next-of-kin filed a civil action for compensation on June 25, 1993 (*supra* paras. 36 and 45). Lastly, it is undisputed that, to date, despite having a few judgments issued in the context of this civil lawsuit, there is no final decision which has provided any relief to the alleged victim's next-of-kin, as there are still appeals pending a decision.

80. The petition was submitted to the IACHR on December 8, 2004. Taking the aforementioned (*supra* para. 79) into consideration, the Commission notes that, as of the submission of the petition, the alleged victim's next-of-kin were still actively pursuing relief by means of the civil action for compensation (*supra* paras. 36—43 and 45-46). Moreover, such civil lawsuit remains pending to date. In view of such specific circumstances, in this case, the Commission considers that the petition submitted by the petitioners on December 8, 2004, was filed within a reasonable time, in conformity Article 32(2) of its Rules of Procedure.

3. Duplication of procedures and international *res judicata*

81. The record does not suggest that the subject matter of the petition is pending before any other international procedure for settlement, nor does it reproduce a petition already examined by any other international body. Therefore, the requirements established in 46(1)(c) and 47(d) of the American Convention have been met.

4. Characterization of the alleged facts

82. For the purposes of admissibility, the IACHR must decide whether the facts alleged tend to establish a violation, as stipulated in Article 47(b) of the American Convention, and whether the petition is “manifestly groundless” or whether it is “obviously out of order,” as per Article 47(c).

83. The standard of appreciation in applying these rules is very different from that required to decide on the merits of a complaint. The IACHR must perform a *prima facie* evaluation to examine whether the complaint states an apparent or potential violation of a right guaranteed by the American Convention, not to establish the existence of a violation. Such a review is a summary analysis that does not imply any prejudging or anticipated opinion on the merits.[FN30]

[FN30] IACHR, Report No. 21/04, Petition 12,190, José Luis Tapia González et al., Admissibility, Chile, February 24, 2004, para. 33.

84. The Commission does not find that the petition is “manifestly groundless” or “obviously out of order.” Accordingly, it is considered that, *prima facie*, the petitioners have made the showing required by Article 47(b) and (c) of the American Convention.

85. Mindful of the foregoing, the Commission considers that, if the facts stated in relation to the alleged mistreatment and torture which resulted in the death of the alleged victim were true, it would be possible to find violations of Articles I and XVIII of the American Declaration, and Articles 1, 6, 8, and 9 of the Inter-American Convention against Torture.

86. Moreover, if the facts alleged in relation to the supposed violations of the rights to enjoy judicial guarantees and judicial protection to the detriment of the alleged victim’s next-of-kin are shown, it would be possible to find a violation of Articles 8(1) and 25 of the American Convention,[FN31] in relation to Article 1(1) thereof, to the detriment of the alleged victim’s next-of-kin, Sebastião Alves da Silveira and Carmen Lucia Lapoente da Silveira. Lastly, the Commission notes that, the application of military jurisdiction to the facts of the present case might also amount to the State’s lack of compliance with its duty to give effect to the provisions under Articles 8(1) and 25 of the American Convention. Therefore, in application of the principle *iura novit curia*, [FN32] the Commission will also examine at the merits stage a possible violation of such provisions in relation to Article 2 of the American Convention.

[FN31] Article XVIII of the American Declaration is no longer a principal source of law, mindful of the case-law referred to *supra*, and considering that the civil action for compensation was filed on June 25, 1993, when the American Convention had already entered in force for Brazil.

[FN32] Permanent Court of International Justice, *Lotus Case*, Judgment of September 7, 1927, Series A No. 10, page 31.

V. CONCLUSIONS ON COMPETENCE AND ADMISSIBILITY

87. Based on the foregoing considerations of fact and law, the Commission concludes that it is competent to take cognizance of this petition, and that the petition meets the admissibility requirements, pursuant to Articles 46 and 47 of the American Convention and Articles 30 and others of its Rules of Procedure.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To find, without prejudice to the merits of this complaint, that the petition is admissible in relation to the facts alleged related to Articles I and XVIII of the American Declaration, Articles 8(1) and 25 of the American Convention, in relation to Articles 1(1) and 2 of the same instrument, as well as Articles 1, 6, 8, and 9 of the Inter-American Convention against Torture.
2. To forward this report to the State and the petitioner.
3. 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 16th day of the month of October, 2008.
(Signed): Paolo G. Carozza, Chairman; Luz Patricia Mejía Guerrero, First Vice Chairwoman, Felipe González, Second Vice Chairman; Sir Clare K. Roberts, Florentín Meléndez, and Víctor Abramovich, members of the Commission.