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Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 61/09; Petition 373-03
Title/Style of Cause: Josenildo Joao de Freitas Jr., Elma Soraya Souza Novais, Jefferson Jose de Freitas, Jeizon Eric Novais de Freitas and Roxana Novais Rodrigues v. Brazil
Doc. Type: Decision
Decided by: President: Luz Patricia Mejia Guerrero;
First Vice President: Victor Abramovich;
Second Vice President: Felipe Gonzalez;
Commissioner: Paolo Carozza.
Commissioner Paulo Sergio Pinheiro, a Brazilian national, did not participate in the discussion or decision of this petition, in accordance with Article 17.2.a of the Commission's Rules of Procedure.
Dated: 22 July 2009
Citation: Joao de Freitas Jr. v. Brazil, Petition 373-03, Inter-Am. C.H.R., Report No. 61/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Represented by: APPLICANT: DHInternacional
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I. SUMMARY

1. On May 17, 2003, the Inter-American Commission on Human Rights (hereinafter, “the Inter-American Commission” or “the IACHR”) received a petition claiming the international responsibility of the Federative Republic of Brazil (“the State” or “Brazil”) for the alleged murder of Josenildo João de Freitas Jr. (“the alleged victim”) at the hands of a death squad comprising military police officers from the state of Pernambuco, and also claiming the effect of those violations on the members of his family: his mother, Elma Soraya Souza Novais, and his siblings, Jefferson José de Freitas, Jeizon Eric Novais de Freitas, and Roxana Novais Rodrigues (jointly, “the alleged victims”). The petition holds that the State is responsible for violating the right to life, the right to equality before the law, the right to a fair trial, and the right to judicial protection with respect to the alleged victims. The petition was lodged by DHInternacional (hereinafter “the petitioner”).

2. The petitioner claims that the alleged victim was executed on December 15, 1999, receiving 16 gunshots from police officers belonging to the Intelligence Service of the Pernambuco Military Police. The petitioner reports that the police investigation of the case was opened on December 16, 1999; that the Public Prosecutor filed criminal charges against four officers of the Military Police on April 9, 2001; and that between December 2004 and December 2005, the four accused were tried at the first instance, with convictions handed down against three of them. According to the petitioner, the appeal that was lodged still remains unresolved. The petitioner therefore maintains that more than nine years have passed since the execution of

the alleged victim and the State has not yet duly punished the persons responsible through a final judicial ruling. Consequently, the petitioner maintains that the Brazilian State has violated Articles 4 (right to life), 24 (equality before the law), 8 (fair trial), and 25 (judicial protection) of the American Convention on Human Rights (“the American Convention” or “the Convention”), and that it has also failed to abide by the general obligations established in Articles 1.1 and 2 thereof.

3. The State replied to the petition on March 24, 2009, holding it to be inadmissible because domestic remedies have not been exhausted, as required by Article 46.1.a of the American Convention. The State further maintained that domestic remedies have been effective in conducting a serious and exhaustive investigation of the facts of the alleged victim’s murder and that, in addition, the complexity of the investigation should be taken into account.

4. Without prejudging the merits of the case, and in accordance with the provisions of Articles 46 and 47 of the American Convention, the Inter-American Commission decides: to rule the petition admissible with respect to the alleged violation of Articles 4.1, 24, 8.1, and 25.1 of the American Convention, all in conjunction with the general obligations established by Articles 1.1 and 2 thereof. In addition, in accordance with the principle of *iura novit curia*, the IACHR rules the petition admissible with respect to the alleged violation of Article 5.1 of the American Convention as regards the alleged victim’s mother and siblings. The Commission also decides to publish this report and to include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BY THE COMMISSION

5. The complaint was received on May 17, 2003. On July 7, 2003, the IACHR forwarded the relevant parts of the complaint to the State, along with a deadline of two months in which to submit its comments. The Inter-American Commission received additional information from the petitioner on December 3, 2004, December 22, 2004, and April 26, 2005, and those communications were duly forwarded to the State.

6. Although the State submitted information on the precautionary measures granted (see below), in light of its failure to reply to the petition, on February 11, 2009, the IACHR again conveyed its request for comments to Brazil and also requested up-to-date information from the petitioner. The State submitted its comments on March 24, 2009, and the petitioner presented up-to-date information on April 2, 2009.

Precautionary measures

7. On November 5, 2002, the petitioner requested precautionary measures to protect the life and integrity of the alleged victim’s mother, Elma Soraya Souza Novais. On November 21, 2002, the Inter-American Commission resolved to grant precautionary measures on behalf of Elma Soraya Souza Novais and asked the State to take all steps necessary to protect the beneficiary’s life and personal integrity. Pursuant to a request made by the petitioner on the basis of new facts, on March 14, 2003, the IACHR extended the precautionary measures to cover Elma Soraya

Souza Novais' children: Jefferson José de Freitas, Jeizon Eric Novais de Freitas, and Roxana Novais Rodrigues.

8. The petitioner submitted additional information on the following dates: December 6, 2002; January 16, 2003; January 30, 2003; March 31, 2003; April 7, 2003; April 16, 2003; May 14, 2003; May 16, 2003; June 30, 2003; August 21, 2003; November 18, 2003; January 7, 2004; January 13, 2004; April 14, 2004; May 31, 2004; August 16, 2004; December 3, 2004; December 22, 2004; April 25, 2005; May 17, 2005; June 3, 2005; September 19, 2005; December 5, 2005; December 26, 2005; and June 28, 2006. Those communications were duly forwarded to the State.

9. The State presented information in connection with the precautionary measures granted by the IACHR on January 22, 2003, January 20, 2004, September 14, 2004, and December 28, 2004. Those communications were also duly forwarded to the petitioner.

10. On February 27, 2003, during its 117th regular session, the IACHR held a public hearing on the implementation of the precautionary measures. Later, on March 1, 2004, during its 119th regular session, the IACHR held a working meeting to follow up on the precautionary measures.

11. Based on the information furnished by the parties, the IACHR resolved to extend the term of the precautionary measures on the following dates: May 20, 2003; December 3, 2003; June 7, 2004; December 7, 2004; June 20, 2005; December 28, 2005; and July 27, 2006.

III. POSITIONS OF THE PARTIES

A. Petitioner

12. The petitioner claims that at the time of the alleged victim's execution, it was common for the press in the city of Caruaru, state of Pernambuco, to report incidents of deaths, threats, and torture of the general population perpetrated by officers belonging to the Intelligence Service ("SEI") of the state's Military Police. There were no rigorous judicial investigations of those incidents, claims the petitioner, and violence and impunity prevailed. The petitioner reports that the SEI was created in 1997, initially to investigate crimes committed by officers of the Military Police itself. Later, however, the petitioner claims that the agency's officers abused their power and carried out actions unrelated to their duties. Following the alleged victim's murder, the Governor of Pernambuco disbanded the SEI, presumably because of public pressure and the repercussions of this case.

13. The petitioner claims that the alleged victim, aged 24, had received a series of death threats from the same police officers charged with his murder. According to the information, the alleged victim had been identified as the killer of an individual by the name of Arnaldo, the brother of the police officer known by the nickname Esquerdinha, and since that time he began to receive threats from various members of the police. On account of this, the petitioner reports that the alleged victim filed a complaint with the commanding officer of the 4th Battalion of the Military Police, reporting the facts and requesting the assistance of the security authorities. In addition, the alleged victim sent a letter to human rights groups, stating that were he to be killed,

the persons responsible would be the military police officers Marcos José Rolim, José Arimatéia Brazão, Erivaldo Gonçalves dos Santos, and Gilson Barbosa dos Santos, with the support of Esquerdinha and Cabo Numeriano.

14. According to the petition, those threats crystallized on December 15, 1999, when the alleged victim was hunted down and executed in public by 16 gunshots. The petitioner reports that following the alleged victim's death, his family continued to receive death threats because of the efforts of the alleged victim's mother against impunity and her actions as an assistant attorney for the prosecution in the domestic criminal trial.

15. The petitioner claims that two sets of proceedings were pursued to investigate the incident: a civil case (the police investigation of the crime), and an administrative case within the Military Police to investigate possible irregularities in the actions of its officers. According to the petitioner, the civil police investigation (Inquérito Policial) was opened on December 16, 1999. Statements were taken from a number of eye witnesses and other evidence was also gathered; however, the inquiry was allegedly hindered by the accused officers, which led to delays in the proceedings. The petitioner notes that the police investigation lasted fourteen months before ending on February 16, 2001. The investigation concluded that officers Marcos José Rolim, Gilson Barbosa dos Santos, José Arimatéia Brazão, and Erivaldo Gonçalves dos Santos were responsible for the alleged victim's murder. In contrast, the administrative proceedings, which began on February 18, 2000, and concluded on May 17, 2008, found that none of the officers were in any way responsible.

16. The petitioner reports that shortly after, on April 9, 2001, the Public Prosecutor filed criminal charges. On October 15, 2002, at the conclusion of the evidentiary phase, the judge decided not to admit the charges (Sentença de Impronúncia)[FN2] for referral to the Jury Court. The mother of the alleged victim filed an appeal against that decision (recurso em sentido estrito). As reported by the petitioner, the Court of Justice of Pernambuco overturned the decision in a judgment published on July 21, 2003.

[FN2] In crimes over which the Jury Court has jurisdiction, following the evidentiary phase the judge must analyze the evidence in the proceedings to see whether the probable commission of a crime against life can be determined, together with the corresponding identification of the suspects. The judge then prepares the Pronúncia decision, which attests the existence of evidence indicating the commission of a crime and its perpetrators and indicates the legal provision that the accused is suspected of having breached. If those elements are not present, an Impronúncia judgment is issued. Regarding Pronúncia and Impronúncia, see Articles 413, 414, et seq. of the Brazilian Code of Criminal Procedure (as amended by Law No. 11.689 in 2008).

17. Since the accused were officers of the Military Police and allegedly members of a death squad, on October 1, 2003, the mother of the alleged victim requested a change of venue for the trial from the city of Caruaru to Recife, state capital of Pernambuco; and on February 14, 2004, a decision accepting that request was issued. Subsequently, in separate decisions handed down on December 18, 2004, April 28, 2005, and December 6, 2005, the accused Marcos José Rolim,

José Arimatéa Brazão, and Gilson Barbosa dos Santos were respectively sentenced to prison terms of 14 years for the doubly aggravated murder of the alleged victim. Officer Erivaldo Gonçalves dos Santos was acquitted on April 28, 2005.

18. The petitioner reports that the counsel for the accused and the prosecution team both lodged appeals against the first-instance judgments, and those appeals have to date not been resolved.

19. Consequently, the petitioner holds that there has been an unwarranted delay in giving a final judgment on the domestic judicial remedies, as provided for in Article 46.2.c of the American Convention. In addition, the petitioner claims that Brazilian law, by giving the Military Police jurisdiction to investigate human rights violations perpetrated by its officers, does not provide for due legal process in such cases, and so the exception provided for in Article 46.2.a of the Convention is also applicable.

B. State

20. In its first reply, lodged on March 24, 2009, Brazil held that the petition was inadmissible because domestic remedies had not been exhausted, as required by Article 46.1.a of the American Convention. In addition, the State maintained that domestic remedies have been effective in ensuring a serious and exhaustive investigation of the facts related to the alleged victim's murder, and that the complexity of the investigation should also be taken into account.

21. According to the State, the criminal complaint relating to the alleged victim's death, which occurred on December 15, 1999, was filed with the Public Prosecution Service on April 9, 2001. The State also confirms the dates on which Marcos José Rolim, José Arimatéa Brazão, and Gilson Barbosa dos Santos were convicted, and the date of the acquittal of Erivaldo Gonçalves dos Santos.

22. The State emphasizes the fact that the alleged victim's family was under police protection for six years pursuant to the precautionary measures granted by the IACHR. The State also notes that at the time the petition was lodged with the Inter-American Commission, the authorities were taking all the necessary steps to prevent impunity from prevailing in the case at hand and to convict the accused police officers. Consequently, Brazil stresses that the criminal proceedings in this case are progressing normally before the domestic courts, showing that the State is fully capable of appropriately and effectively resolving the alleged victim's murder.

23. In consideration whereof, the State asks the IACHR to declare this petition inadmissible, in compliance with Article 47.a of the American Convention.

IV. ANALYSIS OF ADMISSIBILITY

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

24. The petitioner has standing to lodge complaints with the Commission, pursuant to Article 44 of the Convention. The petition identifies, as its alleged victims, Josenildo João de Freitas Jr. and his family (mother and siblings), with respect to whom the Brazilian State had agreed to respect and ensure the rights enshrined in the American Convention. As regards the State, the Federative Republic of Brazil ratified the American Convention on Human Rights on September 25, 1992, and so the Commission has competence *rationae personae* to examine the petition.

25. The IACHR has competence *rationae loci* to hear the petition, since it alleges violations of human rights protected by the American Convention that allegedly took place under the jurisdiction of Brazil, a State Party to that treaty.

26. The Inter-American Commission also has competence *rationae temporis*, since the petition alleges violations of rights protected by the American Convention that took place as a result of and subsequent to the alleged victim's death on December 15, 1999, when the American Convention was already in force for Brazil. Finally, the IACHR also has competence *rationae materiae*, in that the petitioners describe alleged violations of rights protected by the American Convention.

B. Other admissibility requirements of the petition

1. Exhaustion of domestic remedies

27. Under Article 46.1 of the American Convention, for a petition to be admitted by the Commission, the remedies offered by domestic jurisdiction must have been exhausted in accordance with generally recognized principles of international law. The second paragraph of that article states that those provisions shall not apply when domestic legislation does not afford due process of law for the protection of the right in question, when the alleged victim has been denied access to the remedies offered by domestic law, or when there has been an unwarranted delay in rendering a final judgment under those remedies.

28. The IACHR notes that in cases such as the one at hand, which involve criminal offenses prosecutable *ex officio*, the suitable and effective remedy is normally a criminal investigation and trial. Therefore, the Inter-American Commission notes that the criminal investigation led by the Civilian Police began on December 16, 1999, and that the corresponding criminal action before the domestic courts began on April 9, 2001. The record also indicates that in the prosecution for the crime of doubly aggravated murder, first-instance judgments were handed down whereby three of the accused were convicted and one was acquitted on, respectively, December 18, 2004, April 28, 2005, and December 6, 2005. Those decisions were appealed and, according to information furnished by both parties, the appeals have not yet been resolved.

29. The Inter-American Commission must take into account that the execution of the alleged victim took place on December 15, 1999 – that is, more than nine years ago – and that the criminal proceedings brought against the alleged perpetrators have not yet concluded. Moreover, the State has presented no specific information on particular circumstances applicable to this case that could justify, for the purposes of the admissibility ruling, the length of time that has

gone by since the murder of the alleged victim and during which the domestic courts have not issued a final judgment.

30. Indeed, the prior exhaustion rule must never “lead to a halt or delay that would render international action in support of the defenseless victim ineffective.”[FN3] In the case at hand, since the criminal trial is still pending final judgment more than nine years after the execution of the alleged victim, and since the prior exhaustion requirement cannot be interpreted in a way that would cause a prolonged or unjustified hindrance of access to the inter-American system, the IACHR believes that the exception provided for in Article 46.2.c of the American Convention is applicable.

[FN3] I/A Court H. R., Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987, Series C No. 1, paragraph 93.

31. Finally, it must be pointed out that the invocation of the exceptions to the rule requiring the exhaustion of domestic remedies bears an intimate relation with the possible violation of certain rights protected by the American Convention, such as the guarantee of access to justice. Nevertheless, Article 46.2 of the American Convention is, by its very nature and purpose, a provision with autonomous content vis-à-vis the substantive precepts of that international instrument. Consequently, whether or not the Convention’s exceptions to the rule requiring the prior exhaustion of domestic remedies are applicable in the case at hand must be decided prior to and in isolation from the analysis of the merits of the case, and that is because it depends on a standard of appreciation that is different from the one used to determine whether or not Articles 8 and 25 of the Convention have been violated.[FN4] Consequently, the Inter-American Commission notes that the causes and effects of the unwarranted delay in domestic remedies in the case at hand will be analyzed, as appropriate, in the Commission’s future report on the merits of the matter, in order to verify whether or not they constitute possible violations of the American Convention.

[FN4] IACHR, Report No. 72/08, Petition 1342-04, Admissibility, Márcio Lapoente da Silveira (Brazil), October 16, 2008, paragraph 75; Report No. 23/07, Petition 435-06, Admissibility, Eduardo José Landaeta Mejía et al., Venezuela, March 9, 2007, paragraph 47; Report No. 40/07, Petition 665-05, Admissibility, Alan Felipe da Silva, Leonardo Santos da Silva, Rodrigo da Guia Martins Figueiro Tavares, et al., Brazil, July 23, 2007, paragraph 55.

2. Timeliness of the petition

32. Article 46.1.b of the Convention requires that petitions be lodged within a period of six months following notification of the final judgment. On the other hand, Article 32.2 of the Commission’s Rules of Procedure provides that:

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.

33. Given the circumstances of the instant case, the IACHR has already ruled above that an exception to the rule requiring the exhaustion of domestic remedies is applicable, and so it must now determine whether the petition was lodged within a reasonable time. The petition was filed on May 17, 2003, four years following the alleged victim's death, and a few years after the investigations of the incident but before the first-instance judgments were handed down in 2004 and 2005. In connection with this, the Inter-American Commission notes that in principle, a determination of whether or not the admissibility requirements are met is to be made at the time that the admissibility report is adopted.

34. Bearing in mind the circumstances of the case at hand, particularly the date of the alleged victim's death, the course of the domestic criminal prosecutions as described above, and the claims made regarding an alleged unjustified delay and denial of justice, the Inter-American Commission concludes that the petition was lodged within a reasonable time and that consequently the requirement set by Article 32.2 of the IACHR's Rules of Procedure has been met.

3. Duplication of proceedings and res judicata

35. The case file does not indicate that the substance of the petition is pending in any other international settlement proceeding or that it is substantially the same as another petition already examined by this Commission or any other international body. Hence, the requirements set forth in Articles 46.1.c and 47.d of the American Convention have been met.

4. Characterization of the alleged facts

36. The Inter-American Commission must determine whether the facts described in the petition tend to establish violations of rights enshrined in the American Convention, as required by Article 47.b, or whether the petition, pursuant to Article 47.c, must be rejected because it is "manifestly groundless" or "obviously out of order." At this stage in the proceedings it falls to the IACHR to offer a prima facie evaluation: not to establish alleged violations of the American Convention, but to examine whether the petition describes facts that could tend to establish violations of rights protected by the American Convention. This examination in no way constitutes a prejudgment or preliminary opinion on the merits of the case.[FN5]

[FN5] IACHR, Report No. 21/04, Petition 12.190, Admissibility, José Luíz Tapia González et al., (Chile), February 24, 2004, paragraph 33.

37. Thus, the Commission notes that should it corroborate the petitioner's allegations regarding the failure to prevent the alleged victim's death in spite of the complaint he lodged

with the commanding officer of the Military Police, as well as the allegations regarding the direct responsibility in his execution of State agents from the Military Police acting as a death squad, they could tend to establish violations of Article 4.1 of the American Convention with respect to the alleged victim. In addition, should the allegations regarding the lack of due diligence in the investigation and criminal trial be proven, particularly as regards the right to receive a decision from the competent authorities within a reasonable time and with due legal guarantees and judicial protection, as well as the alleged impunity resulting from a distinct and privileged treatment given to the military police involved, they could tend to establish violations of Articles 24, 8.1 and 25.1 of the American Convention with respect to the alleged victims. All the above references to articles of the Convention are to be read in conjunction with the obligation of respecting rights and the duty of adopting legislative or other measures to ensure enjoyment of the rights enshrined in the Convention, as provided for in Articles 1.1 and 2 thereof. In connection with those articles, the Commission consequently finds this petition to be admissible, as regards Article 47.b of the Convention.

38. Finally, pursuant to the principle of *iura novit curia*, the IACHR believes that the petitioner's allegations, in particular the claims of threats made against the alleged victim's mother and siblings and the treatment they received in their quest for justice, could tend to establish violations of Article 5.1 of the American Convention with respect to Elma Soraya Souza Novais, Jefferson José de Freitas, Jeizon Eric Novais de Freitas, and Roxana Novais Rodrigues.

39. In conclusion, the IACHR decides that the petitioners have, *prima facie*, met the requirements set by Article 47.b. of the American Convention as regards possible violations of Articles 4.1, 5.1, 8.1, and 25.1 of the Convention, all in conjunction with Articles 1.1 and 2 thereof.

V. CONCLUSIONS

40. The Inter-American Commission concludes that it is competent to examine the merits of this case and that the petition is admissible under Articles 46 and 47 of the American Convention. Based on the foregoing considerations of fact and law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To rule the instant petition admissible as regards the alleged violations of the rights protected in Article 4.1 of the American Convention, in conjunction with the general obligations set forth in Articles 1.1 and 2 thereof, with respect to Josenildo João de Freitas Jr.

2. To rule the instant petition admissible as regards the alleged violations of the rights protected in Articles 24, 8.1 and 25.1 of the American Convention, in conjunction with the general obligations set forth in Articles 1.1 and 2 thereof, with respect to Josenildo João de Freitas Jr., Elma Soraya Souza Novais, Jefferson José de Freitas, Jeizon Eric Novais de Freitas, and Roxana Novais Rodrigues.

3. To rule admissible, pursuant to the principle of *iura novit curia*, the claims regarding the alleged violation of Article 5.1 of the American Convention, in conjunction with Article 1.1 thereof, with respect to Elma Soraya Souza Novais, Jefferson José de Freitas, Jeizon Eric Novais de Freitas, and Roxana Novais Rodrigues.
4. To give notice of this decision to the parties.
5. To continue with its analysis of the merits of this case.
6. To publish this decision and to include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 22nd day of the month of July, 2009. (Signed): Luz Patricia Mejía Guerrero, President; Víctor E. Abramovich, First Vice-president; Felipe González, Second Vice-president, and Paolo Carozza, members of the Commission.