

**REPORT No. 6/10<sup>1</sup>**  
PETITION 262-05  
ADMISSIBILITY  
JOSÉ DO EGITO ROMÃO DINIZ  
BRAZIL  
March 15, 2010

**I. SUMMARY**

1. On March 14, 2005, 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”), as well as of the state of Rio de Janeiro, for the alleged torture of José do Egito Romão Diniz (“the alleged victim”) at the hands of a civil police officer from the state of Rio de Janeiro, who was allegedly trying to obtain the alleged victim’s confession. The petition was presented by Rogério Nunes de Oliveira and João Paulo de Aguiar Sampaio Souza, both of them Public Defenders of the state of Rio de Janeiro.

2. The petitioners maintain that, on August 22, 2004, civil police officer Rogério Gomes Pontes brought the alleged victim to the 134<sup>th</sup> Police District in Campos dos Goytacazes city, Rio de Janeiro, supposedly for a confrontation with another witness. Once at the Police District, however, the petitioners claim that the aforementioned police officer verbally threatened the alleged victim in order to forcibly coerce a confession, then proceeded to hit and kick him, grabbed the alleged victim’s head while he was handcuffed and smashed it against the wall several times. The petitioners add that these acts have been left unpunished by Brazilian authorities. Therefore, the petitioners maintain that the State is responsible for violating Articles 2, 3 and 6 of the Inter-American Convention to Prevent and Punish Torture.

3. The State affirms that the petition is inadmissible because domestic remedies have not been exhausted, as required by Article 46(1)(a) of the American Convention on Human Rights (“the American Convention”). In that regard, the State asserts that both the administrative and the police investigations conducted into the matter were archived. Notwithstanding, Brazil claims that the judicial decision to archive the police investigation does not exhaust the remedies under domestic law, and further observes that the alleged victim did not pursue a civil action for compensatory damages. Lastly, the State maintains that the Inter-American Commission is not competent *ratione personae* to examine complaints against Rio de Janeiro, since it was the Federative Republic of Brazil that ratified the American Convention on September 25, 1992.

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 Article 6 of the Inter-American Convention to Prevent and Punish Torture and, in accordance with the principle of *iura novit curia*, the IACHR also rules the petition admissible with respect to possible violations of Articles 1, 7 and 8 of the same instrument; as well as with regard to potential violations of Articles 5, 8 and 25 of the American Convention, in conjunction with the general obligations established by Article 1(1) thereof. The Inter-American 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 INTER-AMERICAN COMMISSION**

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<sup>1</sup> Commissioner Paulo Sérgio Pinheiro, a Brazilian national, did not participate in the discussion or decision of this petition, in accordance with Article 17.2.a of the IACHR’s Rules of Procedure.

5. The petition was received on March 14, 2005. On August 16, 2006, 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 State submitted its response to this petition on November 29, 2006 and December 1, 2006. These communications were duly submitted to the petitioners.

6. The Inter-American Commission received additional information from the petitioners on February 23, 2007, and duly forwarded it to the State. The State, for its part, sent additional information to the IACHR on April 20, 2007. This communication was duly forwarded to the petitioners.

### **III. POSITIONS OF THE PARTIES**

#### **A. Petitioners**

7. The petitioners allege that the Public Defender's Office of Rio de Janeiro is an institution dedicated to providing legal assistance to those without means, as provided under Articles 5, LXXIV and 134 of the Brazilian Federal Constitution. Moreover, in line with *Carta do Rio de Janeiro*, which was the final document approved at the end of the 2<sup>nd</sup> Inter-American Conference of Public Defenders, public defenders have the inherent duty to denounce cruel and inhuman treatment and all forms of violence, and upon exhausting all domestic remedies for the protection of human rights, must activate other national and international institutions for the protection of human rights.

8. The petitioners claim that the alleged victim, José do Egito Romão Diniz, had been convicted of a crime, and as a result he was serving his sentence under a semi-open regimen at the Prison "Carlos Tinoco da Fonseca", in Campos dos Goytacazes city, Rio de Janeiro state. On August 24, 2009, the petitioners report that the alleged victim was escorted by police officer Rogério Gomes Pontes to the 134<sup>th</sup> Police District, supposedly in order to be submitted to a confrontation with another witness. However, the petitioners assert that upon arriving at the police district, the alleged victim was subjected to torture at the hands of police officer Pontes, in order to obtain a confession regarding another crime.

9. According to the petitioners, officer Pontes first verbally threatened the alleged victim. They state that, despite the verbal threats, the alleged victim determinedly remained silent. Consequently, the petitioners allege that officer Pontes started kicking and punching the alleged victim while he was handcuffed, then smashed the alleged victim's head against the wall several times.

10. The petitioners add that the alleged victim's wife, Françoase Domingues Travassos, arrived at the police district after he had been tortured, and saw his wounds and bleeding, just before he was taken to a hospital. Later, according to the petitioners, Ms. Travassos witnessed when the alleged victim arrived back at the 134<sup>th</sup> Police District, presenting bruises on his neck and still wearing a bloody shirt after receiving three stitches on the forehead. The petitioners argue that the forensic report and the accompanying photographs in the investigation files confirm the foregoing. Despite all of the above, the petitioners stress that the Office of the Prosecutor did not act with diligence in investigating and prosecuting the case, which led the petitioners to present a formal request for information on November 4, 2004, which remained unanswered.

11. The petitioners add that the police investigation regarding the facts of this petition was archived by means of a judicial decision issued on August 8, 2005, based on the implausible conclusion that the alleged victim had inflicted all his wounds and bruises on himself. They also emphasize that the judicial decision that archives a police investigation is not susceptible to any appeals; therefore, they allege that the remedies under domestic law have been exhausted, in conformity with Article 46(1)(a) of the American Convention.

12. In view of the foregoing, the petitioners hold that Brazil is responsible for violations of Articles 2, 3 and 6 of the Inter-American Convention to Prevent and Punish Torture.

#### **B. State**

13. The State asserts that the petition is inadmissible because domestic remedies have not been exhausted, as required by Article 46(1)(a) of the American Convention. In this regard, the State contends that the petition was presented merely six months after the facts took place, and stresses that the decision to archive a police investigation does not exhaust remedies under domestic law.

14. Indeed, Brazil maintains that the judicial decision to archive a police investigation has a *rebus sic stantibus* nature, thus it does not constitute *res judicata*, because if the circumstances change and new evidence is presented to the authorities – even by the victim himself or his representatives – the police investigation may be reopened.

15. According to the State, the Officer of the Prosecutor investigated the facts related to this petition through a precautionary measure (*Ação Cautelar de Produção Antecipada de Provas* N° 007/PIP/2004) –at the initiative of the Public Defender’s Office– and also supervised and examined the police investigation conducted into the matter (*Inquérito Policial* IP 01/04). The Civil Police also instituted an internal administrative procedure (*Sindicância Administrativa*) to verify any misconduct by one of its officers. On the basis of all those mechanisms and the information collected through them, the prosecutor understood that torture did not take place, in virtue of the fact that “the lesions observed on [the alleged victim] are compatible with resistance to arrest and self-inflicted lesions”.

16. In view of the foregoing, the State maintains that the competent judicial authority decided to archive the police investigation and the other criminal procedures by means of a decision issued on August 8, 2005. Likewise, on the basis of the aforementioned judicial decision, the internal administrative procedure was also archived on August 24, 2005.

17. Moreover, the State initially asserted that neither the alleged victim nor his family pursued a civil action for compensatory damages, which further confirmed that domestic remedies had not been exhausted. In its subsequent communication of April 20, 2007, the State added that there actually were two pending civil lawsuits for compensatory damages related to this petition. One of them was filed by the alleged victim (No. 2005.014.019070-2) for direct damages, and the other one by the alleged victim’s wife (No. 2005.014.028111-2) for indirect damages supposedly suffered by her and by their underage son, João Vitor Travassos Romão. According to the State, both these judicial procedures were still pending before the first instance judge, but they were following their natural course with no undue delay. In addition to that, Brazil emphasized that the petitioners’ failure to mention these procedures in their initial petition made it impossible for the Inter-American Commission to reject this petition at first glance.

18. Finally, the State alleges that the IACHR lacks competence *ratione personae* to examine complaints filed against one of the Brazilian federal states, in this particular case Rio de Janeiro.

19. Based on those considerations, the State asks the IACHR to declare this petition inadmissible, due to its incompliance with Article 46.1.a of the American Convention.

#### **IV. ANALYSIS OF ADMISSIBILITY**

##### **A. Competence *ratione personae*, *ratione materiae*, *ratione loci*, and *ratione temporis***

20. The petitioners have standing to lodge petitions with the Inter-American Commission, pursuant to Article 44 of the Convention. The petition identifies as its alleged victim José do Egito Romão Diniz, regarding whom the Brazilian State 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 September 25, 1992, thus the Inter-American Commission has competence *ratione personae* to examine the petition. The IACHR does not have competence *ratione personae* to entertain complaints against the state of Rio de Janeiro as such, since it is “the national government of [a federal] State Party [that] shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction”, and also “shall immediately take suitable measures, in

accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of [the American] Convention.”<sup>2</sup>

21. Under Article 23 of the IACHR’s Rules of Procedure, the Inter-American Commission has competence *ratione materiae* to examine this petition, since it refers to alleged violations of a human right recognized in the American Convention, as well as the Inter-American Convention to Prevent and Punish Torture, treaties over which the IACHR has competence *ratione materiae*. The potential violations described in this petition allegedly took place under the jurisdiction of Brazil, a State Party to both the American Convention and the Inter-American Convention to Prevent and Punish Torture; therefore, the IACHR has competence *ratione loci*.

22. Finally, the Inter-American Commission also has competence *ratione temporis*, since the petition describes potential violations of rights protected by the American Convention, which was ratified by Brazil on September 25, 1992; as well as by the Inter-American Convention to Prevent and Punish Torture, which the State ratified on July 20, 1989.

## **B. Other admissibility requirements**

### **1. Exhaustion of domestic remedies**

23. Under Article 46.1 of the American Convention, for a petition to be admitted by the Inter-American 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.

24. The IACHR notes that in cases involving torture, which is a criminal offense prosecutable *sua sponte* in Brazil, the suitable and effective remedy is normally a criminal investigation and trial. It is an undisputed fact in the instant case that the court decision to archive the police investigation was issued on August 8, 2005. However, the parties disagree as to whether that decision effectively exhausted the remedies under domestic law, in conformity with Article 46(1)(a) of the American Convention.

26. Regarding this matter, the IACHR has consistently held that in Brazil a court decision to archive a police investigation is final, since it is not subject to any legal appeal.<sup>3</sup> In fact, in accordance with Brazilian law, specifically the Code of Criminal Procedure, there is no appeal against a court ruling to archive a police investigation.<sup>4</sup> Therefore, once this judgment has been handed down, for the purposes of admissibility, domestic remedies have been exhausted.

26. Indeed, as the Inter-American Commission has constantly reiterated, the only possibility provided for in Brazilian criminal law for the reopening of an archived police investigation is the discovery of new evidence related to the case, pursuant to Article 18 of the Code of Criminal Procedure<sup>5</sup> and to

<sup>2</sup> American Convention, Articles 28.1 and 28.2.

<sup>3</sup> IACHR. Report No. 37/02, Admissibility, Case 12.001, *Simone André Diniz*, Brazil, October 9, 2002, paras. 25-27; Report No. 80/05, Case 12.397, Inadmissibility, *Hélio Bicudo*, Brazil, October 24, 2005, para. 27; Report No. 41/07, Petition 998-05, Admissibility, *Lazinho Brambilla da Silva*, Brazil, July 23, 2007, para. 57; and Report No. 118/09, Petition 397-04, Inadmissibility, *Nelson Aparecido Trindade*, Brazil, November 12, 2009, para. 22.

<sup>4</sup> IACHR. Report No. 80/05, Case 12.397, Inadmissibility, *Hélio Bicudo*, Brazil, October 24, 2005, para. 28; and Report No. 41/07, Petition 998-05, Admissibility, *Lazinho Brambilla da Silva*, Brazil, July 23, 2007, para. 57.

<sup>5</sup> This Article provides that: “After a judicial authority, based on the lack of grounds for the complaint, has ordered the investigation archived, the police authority may initiate a new investigation should new evidence be discovered.”

Series (*Súmula*) 524 of the Supreme Federal Court.<sup>6</sup> In other words, as pointed out by the State, the decision to archive a police investigation does not entail *res judicata*, since it is a decision that might be subject to reconsideration if new evidence is discovered. Nevertheless, the IACHR considers that such decision leads to the exhaustion of domestic remedies, since it is not susceptible to any judicial appeals.<sup>7</sup>

27. Based on the foregoing arguments, the Inter-American Commission concludes that domestic remedies were exhausted on August 8, 2005, when the court decision to archive the police investigation was handed down. Accordingly, the requirement established by Article 46(1)(a) of the American Convention has been met.

## 2. Timeliness of the petition

28. Article 46.1.b of the American Convention requires that petitions be lodged within a period of six months following notification of the final judgment. The IACHR notes that this petition was presented before the aforementioned exhaustion of domestic remedies; however, the Inter-American Commission observes that, in principle, a determination of whether or not the admissibility requirements are met must be made at the time that the admissibility report is adopted. The instant petition, therefore, meets the requirement set forth in Article 46(1)(b) of the American Convention.

## 3. Duplication of proceedings and international *res judicata*

29. The case file does not indicate that the subject of this petition is pending in any other international proceeding for settlement, or that it is substantially the same as another petition previously studied by the Inter-American Commission or by any other international organization. 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

30. For purposes of admissibility, the Inter-American Commission must determine whether the facts alleged in the petition tend to establish a violation of the rights guaranteed by the American Convention, as required by Article 47(b) thereof, or whether the petition should be rejected as “manifestly groundless” or “obviously out of order,” pursuant to Article 47(c) of the American Convention. The criteria for evaluating these points are different from those applied to determine the merits of a petition. At this stage in the proceedings, the IACHR must make a *prima facie* assessment, not to establish the existence of a violation of rights, but rather to examine whether the petition presents facts that tend to establish a possible violation of a right guaranteed by the American Convention. This examination in no way constitutes a prejudgment or preliminary opinion on the merits of the case.<sup>8</sup>

31. The Inter-American Commission observes that, if proven to be true, the petitioners’ allegations regarding the direct responsibility of a State agent from the Rio de Janeiro Civil Police for torturing the alleged victim, could tend to establish violations of the Inter-American Convention to Prevent and Punish Torture. However, the IACHR is mindful that Articles 2 and 3 of that instrument are provisions that merely define the concept of torture and indicate who might be considered a perpetrator thereof. In view of the foregoing, the Inter-American Commission decides that the petitioners’ allegations regarding acts intentionally performed by a public servant acting in that capacity that potentially amount to torture,

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<sup>6</sup> *Súmula* 524 dissipates any possible ambiguity in the Code of Criminal Procedure, by establishing that: “Once the police investigation is archived, pursuant to a court order handed down at the request of the public prosecutor, a new criminal action may not be undertaken without the discovery of new evidence.”

<sup>7</sup> IACHR. Report No. 80/05, Case 12.397, Inadmissibility, *Hélio Bicudo*, Brazil, October 24, 2005, para. 28; Report No. 41/07, Petition 998-05, Admissibility, *Lazinho Brambilla da Silva*, Brazil, July 23, 2007, para. 57; and Report No. 118/09, Petition 397-04, Inadmissibility, *Nelson Aparecido Trindade*, Brazil, November 12, 2009, para. 23. See also I/A Court H.R. *Case Garibaldi v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 23, 2009. Series C No. 203, paras. 49-51.

<sup>8</sup> IACHR, Report No. 21/04, Petition 12.190, Admissibility, *José Luís Tapia González et al.*, Chile, February 24, 2004, para. 33; and Report No. 61/09, Petition 373-03, Admissibility, *Josenildo João de Freitas Jr. et al.*, Brazil, July 22, 2009, para. 36.

tend to establish a violation of the rights guaranteed under Article 6 of the Inter-American Convention to Prevent and Punish Torture and, in accordance with the principle of *iura novit curia*, under Articles 1, 7 and 8 of the same instrument, as well as Article 5 of the American Convention, in conjunction with the obligation of respecting rights guaranteed therein, as provided for in its Article 1(1).

32. In addition, should the allegations regarding the lack of due diligence in the criminal investigation be proven, they could tend to establish violations of Articles 8 and 25 of the American Convention, in conjunction with the obligation of respecting rights guaranteed therein, as provided for in its Article 1.1

33. In conclusion, the IACHR decides that the petition is not “manifestly groundless” or “obviously out of order” and, as a result, declares that the petitioners have met the *prima facie* requirements set by Article 47(b) of the American Convention as regards potential violations of Articles 1, 6, 7 and 8 of the Inter-American Convention to Prevent and Punish Torture, as well as of Articles 5, 8, and 25 of the American Convention, in conjunction with Article 1(1) of the same international instrument.

## **V. CONCLUSIONS**

34. 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 violation of the rights protected in Article 6 of the Inter-American Convention to Prevent and Punish Torture;
2. To rule the instant petition admissible, pursuant to the principle of *iura novit curia*, as regards potential violations of the rights protected in Articles 1, 7 and 8 of the Inter-American Convention to Prevent and Punish Torture;
3. To rule the instant petition admissible, pursuant to the principle of *iura novit curia*, with regard to potential violations of Articles 5, 8 and 25 of the American Convention, in conjunction with Article 1(1) thereof;
4. To notify both parties about this decision;
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.

Done and signed in the city of Washington, D.C., on the 15<sup>th</sup> day of the month of March, 2010.  
(Signed: Felipe González, President; Dinah Shelton, Second Vice-president; María Silvia Guillén, José de Jesús Orozco Henríquez, and Rodrigo Escobar Gil, members of the Commission).