

**REPORT Nº 38/10<sup>1</sup>**  
PETITION 1198-05  
ADMISSIBILITY  
IVANILDO AMARO DA SILVA *ET AL.*  
BRAZIL  
March 17, 2010

**I. SUMMARY**

1. On October 24, 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”) for a series of attacks against the life and personal integrity of 13 homeless people (“the alleged victims”) in downtown São Paulo, on October 19 and 22, 2004. The petition was presented by the *Fundação Interamericana de Defesa dos Direitos Humanos* (“the petitioner”).

2. The petitioner maintains that, on October 19 and 22, 2004, a series of similar attacks were perpetrated against homeless people in downtown São Paulo. According to the petitioner, the alleged victims were beaten on their heads – some fatally – with wooden sticks and/or iron bars, and there are strong indications that the authors of the attacks included Military Police agents. As a result of the October 19<sup>th</sup> attacks, Ivanildo Amaro da Silva (41 years old), Cosme Rodrigues Machado (56 years old), Antônio Odilon dos Santos (71 years old), Antonio Carlos Medeiros (42 years old), Vanderlei Moreira Alves (30 years old), and two unidentified Caucasian males, both approximately 45 years old, were killed; while José Manuel da Cruz (50 years old) and Messias Rodrigues Moreira (40 years old) were left injured. On October 22, an unidentified Caucasian woman (alias “Maria Baixinha” or “Tia”) of apparently 50 years of age was killed, and the following persons were left injured: Maria de Lourdes de Souza (47 years old), Elias Francisco da Silva (51 years old) and Regildo Rufino Félix dos Santos (38 years old). The petitioner claims that these facts have been left unpunished due to the lack of diligence and the partiality of the authorities in charge of investigating them, alleged to be commonplace in cases involving military police officers. According to the petitioner, more than five years after the attacks, the unlawful killings and injuries against the alleged victims remain in complete impunity. Therefore, the petitioner affirms that the State is responsible for violating Articles 1, 4, 5, 25 and 26 of the American Convention on Human Rights (“the American Convention”).

3. The State maintains that the petition is inadmissible because domestic remedies have not been exhausted, as required by Article 46.1.a of the American Convention. In that regard, the State asserts that there is a pending criminal lawsuit (No. 052.04.3151-0) against five military police officers and a private security guard. According to the State, this criminal lawsuit was filed after exhaustive and detailed investigative work by the competent authorities. Moreover, on this point, the State claims that domestic remedies in the civil sphere have not been exhausted either, since neither the victims nor their representatives have pursued a civil action for compensatory damages. Lastly, the State argues that the IACHR is not competent *ratione materiae* to examine petitions alleging violations of Article 26 of the American Convention, since economic, social and cultural rights cannot be subject matters under the IACHR’s petition system as they do not constitute rights that are easily individualized or immediately enforceable.

4. Without prejudging the merits of the matter, and in accordance with the provisions of Articles 46 and 47 of the American Convention, the Inter-American Commission decides to declare the petition admissible with respect to the alleged violation of Articles 4, 5 and 25 of the American Convention, in conjunction with the general obligation established by Article 1.1 of the same instrument.

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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.

In accordance with the principle of *iura novit curia*, the IACHR also rules the petition admissible with respect to possible violations of Articles 5.1 and 8 of the American Convention, with respect to the family members of the alleged victims, as well as Articles 1, 6, 7 and 8 of the Inter-American Convention to Prevent and Punish Torture. On the other hand, the Inter-American Commission declares this petition inadmissible as regards the alleged violation of Article 26 of the American Convention. The IACHR also decides to notify the parties, publish this report and include it in its Annual Report to the General Assembly of the Organization of American States.

## II. PROCESSING BY THE INTER-AMERICAN COMMISSION

5. The petition was received on October 25, 2005. On March 13, 2006, the petitioner submitted additional information to the Inter-American Commission. On May 23, 2006, the IACHR forwarded the relevant parts of the complaint to the State, and set a two-month deadline in which to submit its comments. The State submitted its response on September 19, 2006, which was duly submitted to the petitioner.

6. The Inter-American Commission received additional information from the petitioner on January 12, 2007 and September 17, 2009; these communications were duly forwarded to the State. The State has not presented any additional information.

## III. POSITIONS OF THE PARTIES

### A. Petitioner

7. The petitioner asserts that a series of similar attacks commonly referred to as the “*Massacre da Sé*” [Sé Massacre]<sup>2</sup> were perpetrated on October 19 and 22, 2004 against homeless people in downtown São Paulo. According to the petitioner, the alleged victims were beaten on their heads --some fatally-- with wooden sticks and/or iron bars, and there are strong indications that the authors of the attacks included Military Police agents. The petitioner states that, as a result of the October 19<sup>th</sup> attacks, Ivanildo Amaro da Silva (41 years old), Cosme Rodrigues Machado (56 years old), Antônio Odilon dos Santos (71 years old), Antonio Carlos Medeiros (42 years old), Vanderlei Moreira Alves (30 years old), and two unidentified Caucasian males, both approximately 45 years old, were killed; while José Manuel da Cruz (50 years old) and Messias Rodrigues Moreira (40 years old) were left injured. On October 22, the petitioner reports that an unidentified Caucasian woman (alias “*Maria Baixinha*” or “*Tia*”) of apparent 50 years of age was killed, and the following were left injured: Maria de Lourdes de Souza (47 years old), Elias Francisco da Silva (51 years old) and Regildo Rufino Félix dos Santos (38 years old).

8. According to the petitioner, two police investigations were initiated with respect to the October 19 and October 22 attacks, respectively inquiries (*Inquérito Policial* – IPL) No. 2879/04 and No. 2914/09. The petitioner indicates that both investigations were conducted by the Specialized Police Department for Homicides and Protection of Persons (*Departamento de Homicídios e Proteção à Pessoa* – D.H.H.P.) of the São Paulo Civil Police. The petitioner states that those two inquiries were joined for processing, in view of the unquestionable connections between the incidents of October 19 and October 22. Further, the petitioner argues that due to the proximity of the municipal elections, the investigation was not adequately carried out at first, and that state and municipal agents verbally accused one another of participation in the crimes. The petitioner adds that, due to heavy popular pressure for a speedy solution, police authorities interrogated survivors and other homeless people in a threatening way, which in their view also harmed the investigation.

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<sup>2</sup> All the attacks allegedly occurred in the area surrounding the São Paulo Metropolitan Cathedral – also known as *Catedral da Sé* – in downtown São Paulo.

9. In view of the foregoing, the petitioner asserts that it requested that the Federal Police conduct the investigations, on the basis of Law No. 10.446 of May 8, 2002;<sup>3</sup> however, that request was rejected. According to the petitioner, on November 11, 2004, the civil police completed the joint inquiry and concluded that the crimes against the alleged victims were perpetrated by two military police officers and a private security guard. However, the petitioner alleges that the Public Prosecutor's Office (*Ministério Público*) concluded that there was not enough evidence to charge the aforementioned people with the crimes and requested additional investigations. The judicial authority allegedly agreed with the public prosecutor.

10. On the basis of Constitutional Amendment No. 45 of December 30, 2004,<sup>4</sup> the petitioner requested on December 29, 2004 that the case be "federalized". However, according to the petitioner, that request was rejected by the Attorney General of the Republic (*Procurador Geral da República*) on April 11, 2005. The petitioner further argues that, in view of the described deficiencies, as of August 19, 2005, three key witnesses of the Sé Massacre had been killed under unexplained circumstances; and that in at least one of those cases, there was strong indication of participation of military police.

11. The petitioner indicates that on October 31, 2005, the Public Prosecutor's Office presented an indictment (*Denúncia*) charging five military police officers and a private security guard with murder (consummated and attempted) against the 13 alleged victims, illicit association and drug trafficking. Notwithstanding the foregoing, the petition stresses that the evidentiary stage did not begin, since the judicial authority rejected the indictment for lack of evidence on November 7, 2005, and ordered that the case be sent back to the police authority for further investigations. The petitioner argues that the Public Prosecutor's Office appealed that decision by means of a *recurso em sentido estrito* on that same date.

12. The petitioner points out that the aforementioned appeal was partially rejected by the São Paulo Court of Justice (*Tribunal de Justiça de São Paulo*), on December 7, 2006. According to that decision, the petitioner reports that the indictment was only accepted with regard to the murder of the unidentified woman --also known as "Maria Baixinha" or "Tia"-- against one of the military police officers and the private security guard. The petitioner stresses that, with regard to all the other crimes and 12 alleged victims, the decision to send the case back to the police authority for further investigations was maintained. The petitioner adds that the Public Prosecutor's Office appealed the decision of the São Paulo Court of Justice by means of a Special Appeal (*Recurso Especial*) before the Superior Tribunal of Justice, but this appeal allegedly remains pending as of the date of the present report.

13. In conclusion, the petitioner emphasizes that, more than five years after the Sé Massacre, the crimes perpetrated against the alleged victims remain unpunished due to the lack of diligence and the partiality of the authorities in charge of investigating them, which is allegedly common

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<sup>3</sup> The petition indicates that Article 1, III of Law no. 10.446 establishes that, "In line with Article 144, § 1º, I, of the Constitution, when there is inter-state or international repercussion which demands uniform response, the Federal Police Department of the Ministry of Justice may, without prejudice to the jurisdiction of the public security bodies listed in Article 144 of the Federal Constitution, particularly the Military and Civil Police of the states, carry out the investigation of the following criminal infractions, among others: III – those related to human rights violations, which the Federative Republic of Brazil agreed to combat in virtue of international treaties to which it is a Party." (Free translation of the Portuguese original: *Na forma do inciso I do § 1º do art. 144 da Constituição, quando houver repercussão interestadual ou internacional que exija repressão uniforme, poderá o Departamento de Polícia Federal do Ministério da Justiça, sem prejuízo da responsabilidade dos órgãos de segurança pública arrolados no art. 144 da Constituição Federal, em especial das Polícias Militares e Cíveis dos Estados, proceder à investigação, dentre outras, das seguintes infrações penais: III – relativas à violação a direitos humanos, que a República Federativa do Brasil se comprometeu a reprimir em decorrência de tratados internacionais de que seja parte.*)

<sup>4</sup> The petition indicates that Article 109, § 5º, of Constitutional Amendment no. 45 provides that, "In cases of serious human rights violations, the Attorney General of the Republic, with a view to ensuring the compliance with obligations arising from international human rights treaties to which Brazil is a Party, may request, before the Superior Tribunal of Justice, in any phase of the police inquiry or judicial process, that jurisdiction be transferred to the Federal Judiciary". (Free translation of the Portuguese original: *Nas hipóteses de grave violação de direitos humanos, o Procurador-Geral da República, com a finalidade de assegurar o cumprimento de obrigações decorrentes de tratados internacionais de direitos humanos dos quais o Brasil seja parte, poderá suscitar, perante o Superior Tribunal de Justiça, em qualquer fase do inquérito ou processo, incidente de deslocamento de competência para a Justiça Federal.*)

place in cases involving military police officers. Moreover, the petitioner observes that, more than five years since the Sé Massacre, the competent authorities have not even initiated the judicial evidentiary stage with regard to any of the crimes against any of the alleged victims, since Brazilian authorities are still questioning the adequacy of the investigation and the sufficiency of evidence collected prior to the indictment of October 31, 2005.

14. In view of the above, the petitioner argues that there has been unwarranted delay in rendering a final judgment, since Brazilian authorities have not even initiated the evidentiary stage of the judicial process regarding the Sé Massacre. Therefore, the petitioner alleges that the exception to the prior exhaustion rule established in Article 46.2.c of the American Convention is applicable. Moreover, the petitioner also points out that the investigation regarding the facts herein has been conducted through procedures and with information to which it does not have access, so it concludes that the alleged victims and their representatives have been “denied access to the remedies under domestic law”, which would additionally imply the applicability of the exception set forth in Article 46.2.b of the American Convention.

15. Finally, the petitioner holds that the State is responsible for violating Articles 1, 4, 5, 25 and 26 of the American Convention, since State agents supposedly perpetrated attacks against the life and personal integrity of the alleged victims; the investigations have purportedly been conducted in a manner in which information is not disclosed and the State has not ensured free legal aid so that the alleged victims and/or their representatives might participate in the proceedings; and the State has supposedly violated the alleged victims’ social right to an adequate housing, which led them to be homeless and more vulnerable to the actions perpetrated by the authors of the Sé Massacre.

## **B. State**

16. The State holds 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 asserts that there is a pending criminal lawsuit (*Ação Penal* No. 052.04.3151-0) against five military police officers and a private security guard. With respect to the same point, the State claims that domestic remedies in the civil sphere have not been exhausted either, since neither the alleged victims nor their representatives have pursued a civil action for compensatory damages. Finally, the State argues that the Inter-American Commission is not competent *ratione materiae* to examine petitions alleging a violation of Article 26 of the American Convention, since economic, social and cultural rights cannot be subject matters under the IACHR’s petition system, as they do not constitute rights that are easily individualized or immediately enforceable.

17. With regard to the criminal investigation and proceedings, the State asserts that criminal lawsuit No. 052.04.3151-0 was filed after exhaustive and detailed investigative work by the competent authorities. In this regard, the State notes that the police investigation resulted in a voluminous file which contained, among other evidentiary elements, statements from more than 115 witnesses; statements from the surviving victims; interception and transcripts of recordings of telephone conversations of the suspects; search and seizure warrants and material collected; and various forensic reports.

18. Along the same lines, the State stresses that its police authorities decided *motu proprio* to join inquiries No. 2879/04 and No. 2914/09 regarding the incidents which took place on October 19 and October 22, respectively, in virtue of their commitment to effectively and uniformly investigate facts which could be interrelated, due to a similar *modus operandi*. In view of the foregoing, the State holds that the petitioner’s allegations are completely unfounded with respect to the investigations not being properly conducted at the initial stage due to political motives related to the October 2004 municipal elections.

19. Additionally, the State argues that, on November 11, 2004, police authorities produced a conclusive report charging military police officer Jayner Aurélio Porfírio with the crimes perpetrated against the alleged victims. The State emphasizes that its authorities conducted the investigations so adequately that they led to the discovery that these crimes went beyond mere attacks against homeless people and were related to organized crime and drug trafficking in downtown São Paulo. According to the State, all these complexities related to the facts of this petition were duly and diligently tackled by the

authorities, which proves that the investigations were carried out impartially, thoroughly and independently, with a view to establishing the truth. Therefore, the State observes that the petitioner's attempts to have federal authorities intervene in the investigations were reckless and unfounded.

20. The State acknowledges that on November 19, 2004 the Public Prosecutor's Office decided not to present an indictment in this case, and instead requested further investigations from the police. The foregoing, according to the State, was strictly with a view to ensuring the collection of the most complete amount of evidence necessary to support a criminal prosecution. In this regard, the State stresses that upon further collection of evidence, an indictment was presented on October 31, 2005, charging six people --including five military police officers-- with murder and attempted murder against the alleged victims; illicit association; and drug trafficking.

21. The State recognizes that the indictment presented by the Public Prosecutor's Office was rejected by the first instance judicial authority. However, the State maintains that the São Paulo Court of Justice (*Tribunal de Justiça de São Paulo*) will be shortly deciding whether the indictment should be accepted, which in turn would allow for the criminal prosecution of the crimes against the alleged victims, or else if it should be rejected due to the necessity of further investigations.

22. As regards exhaustion of domestic remedies, the State concludes that no civil action for compensatory damages was ever filed by the survivors or the representatives of the deceased. The State stresses that anyone without means has the constitutional right to free legal aid in order to protect their rights, and accordingly it claims that the petitioner's arguments regarding the lack of free legal aid are unfounded. Also, on the alleged lack of access to domestic remedies, the State explains that the confidentiality of the investigations and related proceedings is provided for in the Brazilian Code of Criminal Procedure, and that it was necessary given the circumstances of this case, in order to protect the life and personal integrity of survivors and witnesses.

23. In addition, the State argues that the IACHR is not competent *ratione materiae* to entertain petitions alleging a violation of Article 26 of the American Convention, since the realization of that set of rights should be achieved progressively, according to the financial capacity of each State Party. Therefore, the State asserts that the rights implicit in the economic, social, educational, scientific, and cultural standards (ESCR) set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires cannot be immediately demanded. The State concludes that these are rights that cannot be subject matters under the petition system provided for in Articles 44, 51 and 61-69 of the American Convention, as they do not constitute rights that are easily individualized or immediately enforceable.

24. Based on those considerations, the State requests that the IACHR declare this petition inadmissible for lack of compliance with Article 46.1.a of the American Convention as well as Articles 28.h and 31 of the IACHR's Rules of Procedure. Finally, the State requests that the Inter-American Commission declare itself incompetent *ratione materiae* to examine petitions alleging violations of Article 26 of the American Convention.

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

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

25. The petitioner has standing to lodge petitions with the Inter-American Commission pursuant to Article 44 of the American Convention. The petition identifies as its alleged victims 13 homeless people, regarding whom the Brazilian State agreed to respect and ensure the rights enshrined in the Convention. As regards the State, Brazil ratified the American Convention on September 25, 1992, thus the Inter-American Commission has competence *ratione personae* to examine the petition.

26. Under Article 41.f of the American Convention, the IACHR has competence *ratione materiae* "to take action on petitions and communications pursuant to its authority under provisions of Articles 44 through 51 of this Convention." In this regard, Article 44 of the American Convention

establishes that, petitions may be lodged with the Inter-American Commission “containing denunciations or complaints of violation of this Convention by a State Party.” The Inter-American Commission’s competence with regard to alleged violations of a human right recognized in the American Convention is further ratified by Article 23 of the IACHR’s Rules of Procedure. The Inter-American Commission stresses that no provision of the American Convention or any other applicable instruments bars it from examining petitions alleging violations of any of the rights set forth in the American Convention. Specifically with regard to this petition, the Inter-American Commission rules that, as regards the alleged violation of the right to adequate housing, it is one of the rights included in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by Article 34.k of the Protocol of Buenos Aires. Therefore, as expressed previously, the Inter-American Commission reiterates that it is competent *ratione materiae* to examine petitions alleging violations of all human rights recognized in the American Convention, including those provided for in Article 26.<sup>5</sup>

27. The potential violations described in this petition allegedly took place under the jurisdiction of Brazil, a State Party to the American Convention; therefore, the IACHR has competence *ratione loci*. Finally, the Inter-American Commission has competence *ratione temporis*, since the petition describes potential violations of rights protected by the American Convention, which allegedly occurred after the American Convention was already in force for Brazil.

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<sup>5</sup> See, *inter alia*, IACHR. Report No. 102/09, Admissibility, Petition 1380-06, *Pensioners of the National Agricultural Development Bank - BANDESA*, Guatemala, October 29, 2009, paras. 5, 22, 42, 44 and 45; Report No. 38/09, Admissibility and Merits, Case 12.670, *National Association of Ex-Employees of the Peruvian Social Institute et al.*, Peru, March 27, 2009, paras. 68 and 69; Report No. 2/09, Admissibility, Petitions 302-04 and 386-04, *J.S.C.H. and M.G.S.*, Mexico, February 4, 2009, paras. 71 and 72; Report No. 32/05, Admissibility, Petition 642-03, *Rolando Cuscul Pivaral et al. (Persons living with HIV/AIDS)*, Guatemala, March 7, 2005, para. 27; and Report No. 29/01, Admissibility, Petition 12.249, *Jorge Odir Miranda et al.*, El Salvador, March 7, 2001, paras. 4, 34 and 36.

## B. Other admissibility requirements

### 1. Exhaustion of domestic remedies

28. Under Article 46.1 of the American Convention, for a petition to be admitted by the IACHR, the remedies offered by the domestic jurisdiction must have been exhausted in accordance with generally recognized principles of international law. The second paragraph of Article 46 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.

29. The Inter-American Commission notes that in cases such as the one at hand, which involve criminal offenses prosecutable *ex officio* --including aggravated murder-- the suitable and effective remedy is normally a criminal investigation and trial. The IACHR also observes that the joint police inquiry regarding the facts led to the presentation of an indictment on October 31, 2005 (*supra* paras. 11 and 20).<sup>6</sup> It is an undisputed fact in the present case that the first instance criminal judge decided to reject the indictment on November 7, 2005, in view of the absence of essential requisites for its acceptance,<sup>7</sup> namely, sufficient evidence regarding criminal responsibility of the indicted persons (*supra* paras. 13 and 21).<sup>8</sup>

30. The IACHR observes that it is also an undisputed fact that to this date there is no final decision regarding the acceptance of the indictment (or the rejection thereof), since Brazilian judicial authorities are still questioning the adequacy of the investigation and the sufficiency of evidence collected prior to the indictment of October 31, 2005 (*supra* paras. 12, 13 and 21).<sup>9</sup> Therefore, the Inter-American Commission concludes that the relevant Brazilian authorities have not initiated the evidentiary stage of the judicial process regarding the facts of this petition. The IACHR also notes that, according to the Brazilian Code of Criminal Procedure, the foregoing means that the corresponding criminal action before the domestic courts has not formally begun,<sup>10</sup> so that, to date file no. 052.04.3151-0 referred to by the State (*supra* paras. 16 and 17) corresponds to the joint police inquiry about the facts of this petition, not the number of a criminal prosecution file.<sup>11</sup>

31. Additionally, the Inter-American Commission takes particular note that the information presented before it suggests that, since before the indictment was presented on October 31, 2005, no additional investigations have been carried out about the supposed attacks against the 13 homeless people named as alleged victims in this petition. For purposes of admissibility, the IACHR must take into account that the attacks against the alleged victims took place on October 19 and 22, 2004 – that is, more than five years ago – and that Brazilian authorities have not yet initiated the evidentiary stage of the judicial process (*instrução criminal*) regarding those facts.

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<sup>6</sup> State's response of September 19, 2006. Attachment 4 – File 052.04.3151-0: Indictment (pages 1-1 to 49-1); and Petitioner's communication of March 13, 2006. Attachment 1 – Indictment.

<sup>7</sup> Or its "receipt" (*recebimento*), according to Articles 395 and 399 of the Brazilian Code of Criminal Procedure (as amended by Law No. 11.719 in 2008)

<sup>8</sup> State's response of September 19, 2006. Attachment 4 – File 052.04.3151-0: Decision issued by Judge Richard Francisco Chequini (pages 1465-1467); and Petitioner's communication of March 13, 2006. Attachment 2 – Decision issued by Judge Richard Francisco Chequini.

<sup>9</sup> See also FOLHAONLINE. *Entenda o processo do massacre da Sé* [Understanding the proceedings regarding the Sé massacre], August 28, 2009, available at <http://www1.folha.uol.com.br/folha/cotidiano/ult95u614056.shtml> (last viewed on January 7, 2009).

<sup>10</sup> See Articles 395 and 399 of the Brazilian Code of Criminal Procedure (as amended by Law No. 11.719 in 2008); and Julio Fabbrini MIRABETE, *Processo Penal* [Criminal Procedure] 127 (Editora Atlas 1995, 4<sup>th</sup> edition).

<sup>11</sup> State's response of September 19, 2006. Attachment 4 – File 052.04.3151-0: Indictment (page 1-1, which makes reference to *Inquérito Policial* [Police Inquiry] n. 052.04.3151-0).

32. Indeed, as interpreted by the Inter-American Court of Human Rights, the prior exhaustion rule must never “lead to a halt or delay that would render international action in support of the defenseless victim ineffective.”<sup>12</sup> In the case at hand, since a criminal trial has not been initiated more than five years after the attacks against the alleged victims, 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. Therefore, the IACHR rules that the exception provided for in Article 46.2.c of the American Convention is applicable in this matter.

33. In response to the State’s argument that the alleged victims should have exhausted civil remedies to seek compensation, the IACHR notes that such remedies would not respond to the principal claims being raised in this petition concerning what is alleged to have been a lack of due diligence to investigate, prosecute and punish attacks supposedly perpetrated by State agents. Accordingly, it was not necessary for the petitioners to have invoked and exhausted civil remedies.

34. 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 guarantees 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 American 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 American Convention have been violated.<sup>13</sup> 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.

## 2. Timeliness of the petition

35. 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. On the other hand, Article 32.2 of the IACHR’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 [Inter-American] Commission. For this purpose, the [Inter-American] Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

36. Having ruled above that an exception to the rule requiring the exhaustion of domestic remedies is applicable; the Inter-American Commission must now determine whether the petition was lodged within a reasonable time. The petition was filed on October 24, 2005, one year following the attacks against the alleged victims. However, the IACHR notes that a determination of whether or not the admissibility requirements are met is to be made at the time that the admissibility report is adopted. Given the circumstances of the instant case, including the investigation which remains in its initial stage, 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.

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<sup>12</sup> I/A Court H.R., *Velásquez Rodríguez v. Honduras Case*. Preliminary Objections, Judgment of June 26, 1987, Series C No. 1, para. 93.

<sup>13</sup> IACHR, Report No. 61/09, Petition 373-03, Admissibility, *Josenildo João de Freitas Jr. et al.* (Brazil), July 22, 2009, para. 31; IACHR, Report No. 72/08, Petition 1342-04, Admissibility, *Márcio Lapoente da Silveira* (Brazil), October 16, 2008, para. 75; Report No. 23/07, Petition 435-06, Admissibility, *Eduardo José Landaeta Mejía et al.*, Venezuela, March 9, 2007, para. 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, para. 55.

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

37. Nothing in the present case file indicates 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

38. For purposes of admissibility, the Inter-American Commission must determine whether the facts reported 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.” At this stage in the proceedings it falls to the IACHR to carry out 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.<sup>14</sup>

39. The Inter-American Commission observes that, if proven to be true, the petitioner’s allegations regarding the responsibility of State agents from the Military Police of São Paulo in the attacks that resulted in the death of 8 alleged victims and injured the remaining 5 alleged victims, could tend to establish violations of Articles 4 and 5 of the American Convention, in conjunction with the obligation to respect rights recognized therein, as provided for in its Article 1.1. Moreover, in virtue of the principle of *iura novit curia*, the Inter-American Commission decides that the petitioner’s allegations regarding acts intentionally performed by public servants acting in that capacity that potentially amount to torture, tend to establish a violation of the rights guaranteed under Articles 1, 6, 7 and 8 of the Inter-American Convention to Prevent and Punish Torture.

40. In addition, should the allegations regarding the lack of due diligence in the criminal investigations be proven, they could tend to establish violations of Articles 8 (in virtue of the principle of *iura novit curia*) and 25 of the American Convention, in conjunction with the obligation of respecting rights recognized therein, as provided for in its Article 1.1. Also, according to the principle of *iura novit curia*, the IACHR holds that, given the nature of the alleged violations described in this petition, they could tend to establish violations of Article 5.1 of the American Convention with respect to the family members of the alleged victims who might be identified at the merits stage.

41. As regards the alleged violation of Article 26 of the American Convention, the IACHR has ruled *supra* (para. 26) that the right to adequate housing comes within the scope of that provision.<sup>15</sup> Additionally, the Inter-American Commission has determined that the obligation derived from Article 26 of the American Convention,

means a correlative obligation not to back down in the advances achieved in this matter. That is the non regressive obligation developed by other international organisms and understood by the IACHR as a State obligation which compliance can be analyzed by the [Inter-American] Commission through the individual petition system enshrined in the Convention.<sup>16</sup>

42. Despite the foregoing, the petitioner has not presented information or arguments indicating that the homelessness of the alleged victims at the time of occurrence of the attacks of October 19 and 22 represented any regression or restriction on the right of the whole population to adequate

<sup>14</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.

<sup>15</sup> See OAS Charter, Article 34.k.

<sup>16</sup> IACHR, Report No. 38/09, Admissibility and Merits, Case 12.670, *National Association of Ex Employees of the Peruvian Social Security Institute et al.*, Peru, March 27, 2009, para. 139.

housing, nor has the petitioner presented information or substantiated how the attacks against the 13 alleged victims would tend to establish a violation of their individual right to adequate housing.<sup>17</sup> Therefore, the IACHR declares that this petition is inadmissible in that respect, according to Article 47.b of the American Convention.

43. 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, *prima facie*, met the requirements set by Article 47.b. of the American Convention as regards potential violations of Articles 4, 5, 8 and 25 of the American Convention, in conjunction with Article 1.1 of the same instrument. Likewise, the IACHR declares this petition admissible in relation to possible violations of Articles 1, 6, 7 and 8 of the Inter-American Convention to Prevent and Punish Torture. On the contrary, the Inter-American Commission rules that, in conformity with Article 47.b of the American Convention, this claim is inadmissible as regards the alleged violation of Article 26 of the same instrument.

## V. CONCLUSIONS

44. 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 Articles 4, 5 and 25 of the American Convention, in conjunction with Article 1.1 thereof;
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 5.1 and 8 of the American Convention, in conjunction with Article 1.1 thereof, with respect to the family members of the alleged victims, and in Articles 1, 6, 7 and 8 of the Inter-American Convention to Prevent and Punish Torture;
3. To rule the instant petition inadmissible, with regard to the alleged violation of Article 26 of the American Convention;
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 17<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).

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<sup>17</sup> See, *mutatis mutandi*, IACHR, Report No. 132/09, Petition 644-05, Inadmissibility, *Social Security contributions of retired and pensioned civil servants – MOSAP et al.*, Brazil, November 12, 2004, para. 51.