

REPORT No. 40/10¹
PETITION 590-05
ADMISSIBILITY
MARCIO AURELIO GONÇALVES
BRAZIL
March 17, 2010

I. SUMMARY

1. On May 21, 2005, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the IACHR”) received a petition filed by the *Centro de Estudos e Defesa da Cidadania, Direitos Humanos e Segurança Pública* – CEDESP (“the petitioner”) against the Federative Republic of Brazil (“the State” or “Brazil”).

2. The petitioner alleges the attempted homicide of the alleged victim by an agent of the Federal Highway Police (*Polícia Rodoviária Federal*), who is said to have shot a firearm several times at Marcio Aurelio Gonçalves (“the alleged victim”), on June 3, 2000. In addition, the petition notes that due to the fact that the perpetrator of the facts alleged was a state agent, the authorities acted with unwarranted delay and negligence in investigating the crime and in prosecuting and punishing those guilty. According to the petitioner, this has been determinant for the attempted homicide of the alleged victim to remain in impunity several years after the facts. Accordingly, it alleges that the State is responsible for violations of the right to life, integrity, judicial protection, and reparation, to the detriment of the alleged victim.

3. The State argues that the petition is inadmissible for failure to exhaust domestic remedies. In this respect, the State underscores that according to Article 46(1)(a) of the American Convention, the mechanism of petitions before the inter-American system is subsidiary in nature; accordingly, one must first give the State an opportunity to resolve the matter in the domestic courts. According to Brazil, the national authorities have effectively sought justice in relation to the facts by conducting the corresponding police investigation and criminal action, i.e. the mechanisms of the domestic jurisdiction have not been exhausted after a final decision. Therefore, the State argues that the petition is inadmissible, pursuant to Articles 46(1)(a) and 47(a) of the American Convention.

4. After examining the parties’ positions with respect to the requirements set out at Articles 46 and 47 of the American Convention, the Inter-American Commission decides to declare this petition admissible in relation to Articles 4, 5, 8(1), and 25(1) of the American Convention, in conjunction with Article 1(1) of the same. The IACHR also decides to notify the parties of this decision, publish it, and include it in its Annual Report to the OAS General Assembly.

II. PROCESSING BY THE COMMISSION

5. On May 21, 2005, the Inter-American Commission received the complaint from the petitioner. On May 11, 2006, the IACHR requested additional information from the petitioner regarding the facts set forth in the petition. The petitioner submitted the information requested on June 13, 2006.

6. On August 7, 2006, the IACHR sent the State the pertinent parts of the petition, with the request that it send its observations within two months. By note received December 11, 2006, the State submitted its observations on the petition.

7. The petitioner submitted additional information on February 21, 2007. That communication was sent to the State, which in turn submitted additional information on April 20, 2007, which was transmitted to the petitioner.

¹ Commissioner Paulo Sérgio Pinheiro, a Brazilian citizen, did not participate in the deliberations and vote of this report, in keeping with Article 17(2)(a) of the Commission’s Rules of Procedure.

III. POSITIONS OF THE PARTIES

A. The petitioner

8. The petitioner alleges that on June 3, 2000, during a neighbor's birthday party, the beverages ran out. Consequently, a group of guests, including the alleged victim, pulled together money to buy more beverages; Mr. Gonçalves allegedly had taken charge of getting them. Subsequently, according to the petition, a brawl began provoked by some guests who had not paid for the beverages. According to the petitioner, the alleged victim was called to step in with the participants in the fight, to calm down those who caused the altercation. The petition indicates that while the alleged victim tried to talk with them, one of those involved in the altercation --the son of the agent of the Federal Highway Police (*Polícia Rodoviária Federal*) Carlos Augusto Peixoto -- struck the alleged victim in the face and threw him to the ground. Once on the ground, several of the persons involved in the disturbance are said to have kicked the alleged victim.

9. According to the petitioner, the alleged victim was able to free himself from the persons involved in the altercation and get up, after which he tried to escape. Nonetheless, agent Peixoto took out his 40mm pistol and shot twice at the alleged victim, and then fired a shot aimed at his head, but missed. Next, the aforementioned agent of the Federal Highway Police is said to have pursued the alleged victim, and when he caught up with him he hit him in the face and once again placed the pistol to his head and said he was going to kill him. Afterwards, the petitioner indicates that the alleged victim was able to grab the agent by the arm and prevent him from shooting at his head. Nonetheless, the alleged victim is said to have been wounded in the leg by that gunshot, which caused a serious loss of blood.

10. After having been wounded by the shot fired by agent Peixoto, according to the petitioner's account, the other participants in the brawl, including the agent's son, reached the alleged victim and beat him again. The petitioner reports that due to the blows, the alleged victim fainted, after which the persons involved in the altercation proceeded to steal the gold chain he had around his neck, a diamond-studded St. George's medallion, and they escaped. According to the petitioner, the alleged victim was saved from dying from the hemorrhage due to the assistance he received from other persons present, who took him to the "Miguel Couto" Hospital, where he allegedly was on the verge of death for five days.

11. According to the petitioner, the attempted murder of the alleged victim has remained in impunity because the main perpetrator was an agent of the Federal Highway Police. In this respect, the petitioner indicates that the police investigation into the facts took five years, and that it was not until August 2, 2005, that the Office of the Public Prosecutor filed a complaint to initiate the criminal proceeding into the facts. In addition, the petitioner emphasized that the negligence of the police authorities and the Office of the Public Prosecutor led the latter to denounce the police agent for grievous bodily injury (provided for at Article 129, §1, subsection II of the Criminal Code), and not for the crime that he had actually committed – attempted aggravated homicide – provided for at Article 121, §2, subsections II and IV, and that it would result in penalties more severe and better suited to the gravity of the facts.

12. In addition, the petitioner notes that the State continued acting with negligence subsequently. For example, the fact that the state agent accused of the crime against the alleged victim did not appear on October 4, 2005 to testify in the context of the respective criminal proceeding resulted in an additional one-year delay, during which time the proceeding did not advance at all. The petitioner indicates that the authorities did not act with due diligence to ensure the presence of the accused, who also continued working as an agent of the Federal Highway Police.

13. The petitioner concludes that due to the negligence of the state authorities in relation to investigating the crime, and prosecuting and punishing the persons guilty, as well as the delay described *supra*, the attempted homicide of the alleged victim has remained in impunity. Therefore, the petitioner alleges that the State is responsible for violations of the rights to life, integrity, judicial protection, and reparation, to the detriment of the alleged victim.

B. The State

14. The State argues that the petition is inadmissible for failure to exhaust domestic remedies. In this respect, the State reiterates that criminal action No. 2005.001.093724-7 is under way before the 16th Criminal Court of Rio de Janeiro. According to the State, that criminal action was filed after the complaint was lodged on May 31, 2005, by the Office of the Public Prosecutor immediately after the respective police investigation was concluded.

15. The State adds that the criminal action into the facts is in the investigative stage, and that the questioning of the accused is pending; it would come to pass on January 17, 2007. The State notes that the criminal action has unfolded within an absolutely normal time frame; therefore the Brazilian Judicial Branch has taken all measures necessary to investigate and sanction those who may be liable.

16. In addition, with respect to the alleged error in the characterization of the crime alleged by the petitioner (*supra* para. 11), the State clarifies that the Office of the Public Prosecutor is independent and that it denounced the police for grievous bodily injury, since sufficient *indicia* for an attempted homicide (*animus necandi*) were not found. Moreover, the State emphasizes that if, in the course of the criminal proceeding, it were to appear that the crime committed is more serious, the complaint of the Office of the Public Prosecutor may be amended at any moment.

17. Finally, the State describes a series of remedies that are pending until a final decision is reached in the criminal proceeding on the facts, in order to underscore that domestic remedies have not been exhausted and that, consequently, the petition is inadmissible.

18. The State argues that in light of the foregoing, the remedies related to the facts have not been exhausted, and that the criminal action has taken its normal course, with due respect for the rights of the accused. The State asks, therefore, that the Inter-American Commission find the petition inadmissible, pursuant to Articles 46(1)(a) and 47(a) of the American Convention.

IV. ANALYSIS OF ADMISSIBILITY

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

19. According to Article 44 of the American Convention and Article 23 of the IACHR's Rules of Procedure, the petitioner has standing to file a petition. Brazil is a state party to the American Convention, which it ratified on September 25, 1992, by virtue of which it undertook to respect and ensure the alleged victim's rights. In view of the foregoing, the Inter-American Commission is competent *ratione personae* to examine this petition.

20. The IACHR is also competent *ratione temporis* with respect to the alleged violations of rights protected by the American Convention, as it had already come into force for Brazil at the time of the facts alleged.

21. The petition alleges the violation of rights protected in the American Convention, therefore the Commission is competent *ratione materiae* to examine the petition. Finally, the IACHR is competent *ratione loci* to examine the petition insofar as the alleged violations of rights protected by the American Convention took place in the territory of a state party to that instrument.

B. Admissibility of the petition

1. Exhaustion of domestic remedies

22. According to Article 46(1)(a) of the American Convention, in order for the petition to be admissible one must first exhaust domestic remedies. According to Article 46(2)(c) of the same

instrument, the provision that requires the exhaustion of domestic remedies will not be applied when “there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.”

23. In this respect the Inter-American Commission underscores that the provision that requires the prior exhaustion of domestic remedies was established to give the state the opportunity to resolve the matters within its own legal system. In addition, the exceptions provided for at Article 46(2) of the American Convention seek to ensure that the inter-American system can step in when the domestic remedies and the judicial system itself are not effective to ensure respect for the victim’s rights.

24. The petitioner argued throughout the proceedings before the Inter-American Commission that there was an unwarranted delay in the police investigation, in the domestic criminal proceedings, and consequently in the pronouncement of a final judgment. The State alleges that the petition is inadmissible for failure to exhaust domestic remedies.

25. The information and the documents submitted by the parties show that, with respect to the main facts in the petition, which occurred on June 3, 2000, a police investigation was opened (*Inquérito Policial* No. 1153/00) that lasted almost five years until its conclusion on February 24, 2005.² Subsequently, on May 11, 2005, the Office of the Public Prosecutor filed a complaint against the Federal Highway Police agent for grievous bodily injury (provided for at Article 129, §1, subsection II of the Criminal Code).³

26. On August 11, 2005, the 16th Criminal Court of Rio de Janeiro received that complaint and formally began the criminal proceeding against the accused.⁴ In addition, the information available indicates that the next step in said criminal proceeding, that is, the questioning of the accused, did not happen until January 17, 2007.⁵

27. The Inter-American Commission observes that the parties do not controvert the fact that more than nine years after the facts, there is still no final judgment in relation to the crimes allegedly committed against the alleged victim. Nor is there any information to the contrary in the record available before the IACHR; in particular, the Inter-American Commission underscores that the State did not present detailed or specific information to explain the almost five years it took to complete the respective police investigation, or the more than five years it took to formally initiate the criminal action into the facts alleged in this petition (*supra* paras. 25 and 26). In conclusion, the Inter-American Commission decides that, for the purposes of admissibility, there is unwarranted delay in the decision on domestic remedies, and, therefore, the petition is admissible pursuant to Article 46(2)(c) of the American Convention.

28. Finally, it should be noted that the invocation of the exceptions to the rule of prior exhaustion is closely tied to the determination of possible violations of certain rights enshrined in the American Convention, such as the guarantees of access to justice. Nonetheless, Article 46(2) of the American Convention, by its nature and purpose, is a provision with autonomous content vis-à-vis the Convention’s substantive provisions. Therefore, the determination of whether the exceptions to the rule of exhaustion of domestic remedies provided for in that provision are applicable to the case in question should be done prior to and separate from the analysis on the merits, since it depends on a different standard of appreciation than that used to determine the violation of Articles 8 and 25 of the American

² See Annex I of the State’s Response of December 11, 2006: Record of Criminal Action No. 2005.001.093724-7. *Despacho* of the Police Chief Eduardo Joaquim Baptista Filho, of February 24, 2005, p. 59.

³ See Annex I of the State’s Response of December 11, 2006: Record of Criminal Action No. 2005.001.093724-7. *Denúncia* of Prosecutor Pedro Rubim Borges Fontes, of May 31, 2005, pp. 2A and 2B.

⁴ See Annex I of the State’s Response of December 11, 2006: Record of Criminal Action No. 2005.001.093724-7. *Decisão* of Judge Antônio Jayme Boente, of August 11, 2005, p. 62.

⁵ See Annex II of the State’s Response of December 11, of December 2006: Information on the processing of Criminal Action No. 2005.001.093724-7, p. 3.

Convention.⁶ Consequently, the causes and effects that have resulted in the unwarranted delay of domestic remedies in the instant case will be analyzed, as pertinent, in the report the Inter-American Commission prepares on the merits of the dispute, so as to verify whether in fact there are violations of the American Convention.

2. Deadline for lodging a petition

29. Article 46(1)(b) of the American Convention requires that petitions be submitted within six months of the notification of the final decision. Article 32(2) of the Commission's Rules of Procedure provides as follows:

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.

30. The IACHR has already determined in this report (*supra* para. 27) that the exception to the rule of prior exhaustion of domestic remedies holds in this case; accordingly, one must determine whether the petition was submitted in a reasonable time. In this respect, one observes that the petition was filed on May 21, 2005, and it has not been questioned that as of that date, the criminal proceeding has continued to be open. Considering that the petitioners allege unwarranted delay and a denial of justice, the IACHR concludes that the petition was submitted within a reasonable time.

3. Duplication of procedures and *res judicata*

31. There is nothing in the record that suggests that the subject matter of this petition is pending before another procedure for international settlement or that it is substantially the same as another already studied by the Inter-American Commission or by any other international organization, as provided for, respectively, by Articles 46(1)(c) and 47(d) of the American Convention.

4. Characterization of the facts alleged

32. Article 47(b) of the American Convention provides that the IACHR shall declare inadmissible any petition that "does not state facts that tend to establish a violation of the rights guaranteed by this Convention." The standard for determining admissibility is different from that applied to the merits of the case, given that the admissibility determination simply requires that the Inter-American conduct a *prima facie* analysis to determine whether the complaint establishes an apparent or possible violation of a right guaranteed by the American Convention. In other words, the examination on admissibility is summary and does not imply prejudging or issuing a preliminary opinion on the merits.⁷

33. Bearing in mind that the petitioner asserts that a police agent shot at the alleged victim a number of times, with the intention and objective to execute him, which allegedly constituted a serious threat to his life and caused grave wounds, in addition to other mistreatment, if the facts alleged are proven the IACHR considers that they tend to establish a violation of Articles 4 and 5 of the American Convention. In addition, the facts alleged by the petitioner allude to a denial of justice and impunity in relation to the alleged impairment of the victim's right to humane treatment given the fact that the main perpetrator is said to be a state agent, which tends to establish a possible violation of Articles 8(1) and 25(1) of the American Convention. In addition, considering that the alleged victim survived, the IACHR

⁶ IACHR, Report No. 61/09, Petition 373-03, Admissibility, *Josenildo João de Freitas Jr. et al.*, Brazil, July 22, 2009, para. 31; Report No. 72/08, Petition 1342-04, Admissibility, *Márcio Lapoente da Silveira*, Brazil, October 16, 2008, para. 75; Report No. 23/07, Petition 435-2006, Admissibility, *Eduardo José Landaeta Mejía et al.*, Venezuela, March 9, 2007, para. 47; and 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.

⁷ IACHR, Report No. 21/04, Petition 12.190, Admissibility, *José Luis 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.

determines that the facts alleged do not tend to establish a possible violation of Article 4 of the American Convention.

34. Therefore, the Inter-American Commission considers that the petition is admissible in relation to Articles 4, 5, 8(1), and 25(1) of the American Convention, in connection with Article 1(1), in keeping with Articles 47(b) and 47(c) of the same instrument.

V. CONCLUSIONS

35. The Inter-American Commission concludes that it is competent to examine this petition and that it meets the admissibility requirements enshrined in Articles 46 and 47 of the American Convention. Based on the arguments of fact and law mentioned, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this petition admissible with respect to the alleged violations of Articles 4, 5, 8(1), and 25(1) of the American Convention, in conjunction with its Article 1(1);
2. To notify the State and the petitioners of this decision and to continue with the analysis of the case on the merits;
3. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 17th 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).