

REPORT No. 127/10¹

PETITION P-1454-06

THALITA CARVALHO DE MELLO, CARLOS ANDRÉ BATISTA DA SILVA, WILLIAM KELLER AZEVEDO
MARINHEIRO AND ANA PAULA GOULART

ADMISSIBILITY

BRAZIL

October 23, 2010

I. SUMMARY

1. On December 27, 2006, the Inter-American Commission on Human Rights (hereinafter the “Inter-American Commission” or the “IACHR”) received a petition against the Federative Republic of Brazil (the “State” or “Brazil”), alleging its international responsibility for the violation of rights enshrined in the American Convention on Human Rights (“the American Convention”). The petition asserts that Brazil is internationally responsible for the alleged extrajudicial execution of Thalita Carvalho de Mello (16 years old), Carlos André Batista da Silva (22 years old), William Keller Azevedo Marinheiro (24 years old) and Ana Paula Goulart (22 years old), all of whom died on October 10, 1998 (all four of them hereinafter “the alleged victims”). The petition was presented by the non-governmental organization *Projeto Legal* (“the petitioner”).

2. According to the petitioner, on October 10, 1998, on the corner of Maracanã Avenue and São Francisco de Xavier Street, in the northern zone of Rio de Janeiro city, the alleged victims’ vehicle was machine-gunned 42 times, instantly killing three of them. The petitioner reports that Ana Paula Goulart managed to survive the initial shooting and leave the car, but was then killed with 7 shots to the head. The petitioner argues that the individuals who extrajudicially executed the alleged victims were prison guards, military and civil police officers, as well as former military and civil police, who worked as security guards at “Malagueta” nightclub. The petitioner stresses that, more than nine years after the alleged executions, the crimes remain in impunity. Consequently, the petitioner claims that the State has violated the right to life (Article 4), the right to humane treatment (Article 5), the right to dignity (Article 11) and the right to judicial protection (Article 25).

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 judicial process related to the facts alleged in the petition before the 2nd Criminal Chamber of the II Jury Court of Rio de Janeiro under number 1998.001.194348-7, in which 10 persons have been charged for the death of the alleged victims. The foregoing, according to the State, is sufficient evidence that domestic remedies have been effectively pursued by State authorities and are ongoing.

4. Without prejudging the merits of the matters, and in accordance with the provisions of Articles 46 and 47 of the American Convention, the Inter-American Commission decides to declare this petition admissible with respect to the alleged violation of Articles 4, 5 and 25 of the American Convention. 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 to the detriment of the family members of the alleged victims. The IACHR observes that all those provisions will be examined at the merits stage in conjunction with the general obligation established by Article 1.1 of the American Convention. On the other hand, the IACHR declares this petition inadmissible as regards the alleged violation of Article 11 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. PROCEEDINGS BEFORE THE IACHR

¹ 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 December 27, 2006, and on September 25, 2007, the petitioner submitted an additional communication in response to a request for additional information from the IACHR. The relevant parts of those documents were forwarded to the State on December 5, 2007, with a two-month deadline for submitting its response. The State replied by means of notes received by the IACHR on October 15 and October 21, 2008. The IACHR duly submitted these communications to the petitioner.

III. POSITION OF THE PARTIES

A. Position of the petitioner

6. According to the petition, on October 10, 1998, 16-year-old Thalita Carvalho de Mello went to “Malagueta” nightclub, in São Cristóvão district, in the northern zone of Rio de Janeiro city, with her boyfriend, Carlos André Batista da Silva (22 years old), and another couple, William Keller Azevedo Marinheiro (24 years old) and Ana Paula Goulart (22 years old). The petitioner asserts that, upon arriving at the nightclub, the alleged victims had a minor altercation with the head of security, who was supposedly an off-duty prison guard doing private security as a side job. According to the petitioner, the other security guards at the nightclub were also either off-duty military and civil police working side jobs, or former military and civil police. According to the petitioner, the alleged victims decided to leave the nightclub in a Volkswagen sedan.

7. The petitioner maintains that the alleged victims’ Volkswagen was chased by two vehicles with police lights, one with 5 individuals inside and the other one with 6. The petitioner states that these 11 individuals were security guards from “Malagueta” nightclub. According to the petitioner, at around 3 a.m., at a traffic light on the corner of Maracanã Avenue and São Francisco Xavier Street, the individuals in these two cars machine-gunned the alleged victims’ vehicle 42 times, killing all of them instantaneously, with the exception of Ana Paula Goulart. The petitioner alleges that Ana Paula managed to leave the car, injured due to the shooting, but was subsequently executed with 7 shots to the head while trying to get to a nearby gas station for help. The petitioner stresses the magnitude of the attacks, and observes that the crime scene showed that 52 firearms projectiles had been used, while the sedan’s door presented 21 perforations. The petitioner states that this incident became notoriously known as the “Maracanã Massacre” (*Chacina do Maracanã*).

8. The petitioner alleges that Vilma Jurema Carvalho de Mello, the mother of 16-year-old Thalita, denounced the crimes at the 18th Police District, and at that time she was supposedly instructed by police officers not to identify possible suspects. According to the petitioner, after that occasion, Ms. Vilma de Mello became very fearful for her safety, so she requested help from Rio de Janeiro’s Secretariat for Human Rights, where she was advised not to leave her house. The petitioner emphasizes that Thalita’s death and the demeanor of Rio de Janeiro authorities towards these crimes have greatly affected Ms. Vilma de Mello and her younger daughter, Thayane. The petitioner alleges that the security guards of “Malagueta” nightclub are notoriously known in the area as a death squad that terrorizes the population.

9. According to the petitioner, despite the seriousness of the events, eight years and two months after the deaths of the alleged victims, at the time the petition was presented before the IACHR, the police investigation regarding the facts was still unfinished and the crimes remained in impunity. The petitioner indicates that the Office of the Public Prosecutor presented homicide charges against 10 individuals by means of an indictment (*denúncia*), on May 10, 2007, but the commencement of the criminal process was still pending almost nine years after the deaths of the alleged victims. The petitioner stresses that, according to that indictment, several of the defendants were off-duty State agents, including a prison guard, a Navy officer, military police officers and a civil police officer.

10. Based on the foregoing, the petitioner claims that the State violated Articles 4, 5, 11 and 25 of the American Convention. The petitioner adds that the conduct of the authorities and the delays in the police investigation regarding the facts have effectively denied access to the remedies under

domestic law. Therefore, the petitioner concludes that the exception provided for in Article 46.2.b of the American Convention is applicable to this petition.

B. Position of the State

11. The State argues 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 judicial process related to the facts alleged in the petition before the 2nd Criminal Chamber of the II Jury Court of Rio de Janeiro under number 1998.001.194348-7, in which 10 persons have been charged for the deaths of the alleged victims.

12. According to the State, after serious and exhaustive investigative work carried out by police authorities, in which dozens of witnesses were interviewed, guns seized and forensic examinations performed; the Office of the Public Prosecutor presented an indictment against 10 defendants charging them with the aggravated murder of the alleged victims. The State observes that this indictment was partially rejected by the criminal judge, which prompted the Public Prosecutor's Office to present a *recurso em sentido estrito* against that decision, in order to have the indictment accepted in its totality. According to the State, the Rio de Janeiro Court of Justice decided this appeal in favor of the indictment as presented, on April 17, 2008, so the indictment was fully accepted and the evidentiary judicial phase began.

13. The State adds that, in order to simplify and expedite criminal procedures in general, Laws 11.689, 11.690 and 11.719 came into force in August 2008, introducing important changes in the Code of Criminal Procedure.

14. The State argues that domestic remedies have been effectively pursued by State authorities with regard to the facts in this petition, and that the time period since the events took place is justifiable due to the exhaustive investigative work that was carried out, the seriousness and circumstances of the crimes, the multiplicity of defendants and the complexity of the investigation. The State concludes, therefore, that effective domestic remedies are ongoing and that the petition is inadmissible because domestic remedies have not been exhausted. Consequently, the State argues that this petition does not comply with the requirement stipulated in Article 46.1.a of the American Convention.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

15. The petitioner has standing to lodge petitions with the Inter-American Commission pursuant to Article 44 of the American Convention. The alleged victims are persons 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* and *ratione materiae* to examine the petition.

16. 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 that international treaty was already in force for Brazil.

B. Exhaustion of domestic remedies

17. 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 indicates 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.

18. Preliminarily, the Inter-American Commission observes that in cases such as the one at hand, which allegedly involve criminal offenses prosecutable *sua sponte* in Brazil --aggravated murders that have been characterized as extrajudicial, summary or arbitrary executions-- the suitable and effective remedy is normally a criminal investigation and trial before the ordinary judicial system. The IACHR also notes that it is an undisputed fact that to this date there is no final judgment regarding the criminal responsibility over the deaths of the alleged victims (*supra* paras. 9 and 12). Indeed, nothing in the file before the IACHR indicates that the criminal process regarding the deaths of the alleged victims has concluded or produced a final judgment.

19. The Inter-American Commission takes particular note that the police investigations regarding the deaths of the alleged victims lasted from October 10, 1998 until the Office of the Public Prosecutor presented an indictment before the judicial authority on May 10, 2007;² that is to say, the police investigation phase took eight years and 7 months. Subsequently, the judicial authority partially rejected the aforementioned indictment,³ and the Office of the Public Prosecutor appealed that decision by means of a *recurso em sentido estrito*.⁴ The IACHR observes that the judicial process remained suspended while this appeal was pending before the Rio de Janeiro Court of Justice.⁵ The Court of Justice decided the appeal in favor of the indictment on April 17, 2008, thus allowing for the evidentiary stage of the judicial process to begin.⁶ In conclusion, for purposes of admissibility, the IACHR must take into account that the deaths of the alleged victims took place on October 10, 1998; that is to say, more than nine years and six months before the evidentiary stage of the judicial process (*instrução criminal*) was initiated.

20. Under the circumstances of this petition, the Inter-American Commission finds that this period of time significantly exceeds what might be considered reasonable for initial investigations to take place and for a judicial process to commence. The State has argued that the aforementioned delay is not unwarranted in virtue of the exhaustive investigative work carried out, the seriousness and circumstances of the crimes, the multiplicity of defendants and the complexity of the investigation. Having closely examined the files of the police investigation and the judicial files, the IACHR observes that, for the purposes of the admissibility ruling, the State failed to point to precise information or provide specific evidence of particular circumstances applicable to this petition that could justify the length of time --nine years and six months--between when the deaths took place until the evidentiary phase of the judicial process began after April 2008.

21. The IACHR notes in this regard that the Inter-American Court of Human Rights has held that the prior exhaustion rule must never "lead to a halt or delay that would render international action in support of the defenseless victim ineffective."⁷ In the case at hand, since a criminal trial was initiated more than nine years and six months after the deaths of 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 there has been an unwarranted

² Copy of the judicial files of the *recurso em sentido estrito* nº 2008.051.00068, pages 1058-1060 – Attachment II of the State's communication of October 21, 2010.

³ Copy of the judicial files of the *recurso em sentido estrito* nº 2008.051.00068, pages 671-676 – Attachment II of the State's communication of October 21, 2010.

⁴ Copy of the judicial files of the *recurso em sentido estrito* nº 2008.051.00068, pages 715, 716 and 768-773 – Attachment II of the State's communication of October 21, 2010.

⁵ Copy of the judicial files of the *recurso em sentido estrito* nº 2008.051.00068, page 748 – Attachment II of the State's communication of October 21, 2010.

⁶ Copy of the judicial files of the *recurso em sentido estrito* nº 2008.051.00068, pages 1152-1160 – Attachment II of the State's communication of October 21, 2010.

⁷ I/A Court H. R., *Velásquez Rodríguez Case*. Preliminary Objections, Judgment of June 26, 1987, Series C No. 1, para. 93.

delay in rendering a final judgment, and that the exception provided for in Article 46.2.c of the American Convention is applicable in this matter.

22. Finally, it must be pointed out that the unwarranted delay exception bears an intimate relation with the possible violation of certain rights protected by the American Convention, specifically under Articles 8 and 25 of that international instrument. 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, since 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, which will be examined, as appropriate, in the report on the merits of the matter.⁸

C. Timeliness of the petition

23. 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.

24. 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 December 27, 2006. Given the circumstances of this petition, particularly the allegations of denial of justice related to the investigations and criminal procedure, the IACHR concludes that the petition was lodged within a reasonable period of time, so the requirement set by Article 32.2 of the IACHR's Rules of Procedure has been met.

D. Duplication and *res judicata*

25. Nothing in the present 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.

E. Colorable Claim

26. 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 or other applicable treaties, but to examine whether the petition describes facts that could tend to establish violations of rights protected by the inter-American instruments. This examination in no way constitutes a prejudgment or preliminary opinion on the merits of the case.⁹

⁸ 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.

⁹ IACHR, Report No. 61/09, Petition 373-03, Admissibility, *Josenildo João de Freitas Jr. et al.* (Brazil), July 22, 2009, para. 36.

27. The IACHR notes that the alleged victims were purportedly victims of extrajudicial, summary or arbitrary executions allegedly perpetrated by State agents and private individuals. The petitioner also asserts that the crimes have remained in impunity. Therefore, the IACHR decides that, if the facts alleged are proven, they tend to establish a violation of Articles 4, 5 and 25 of the American Convention. Should the allegations regarding the lack of due diligence in the criminal investigations and process be proven, they could additionally tend to establish, in virtue of the principle of *iura novit curia*, violations of Article 8 of the American Convention. Moreover, 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. Also according to the principle of *iura novit curia*, at the merits stage the Inter-American Commission will examine the aforementioned provisions of the American Convention in conjunction with the obligation of respecting rights recognized therein, as provided for in its Article 1.1.

28. Finally, the Commission considers that the petitioner has not presented basic elements to establish *prima facie* a claim concerning a potential violation of the right to honor and dignity, protected under Article 11 of the American Convention. Therefore, the IACHR declares that this petition is inadmissible in this respect, according to Article 47.b of the American Convention.

29. In conclusion, the IACHR decides that this petition is not “manifestly groundless” or “obviously out of order;” and as a result, declares that the petitioner has met *prima facie* 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, as detailed above. The Inter-American Commission rules that, in conformity with Article 47.b of the American Convention, this petition is inadmissible as regards the alleged violation of Article 11 of the same instrument.

V. CONCLUSIONS

30. The Inter-American Commission concludes that it is competent to examine the merits of this case, and decides 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 this 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 of the same instrument;
2. To rule the instant petition admissible, pursuant to the principle of *iura novit curia*, as regards potential violations of the rights protected in Article 8 the American Convention, in conjunction with Article 1.1 thereof;
3. To rule this petition inadmissible, with regard to the alleged violation of Article 11 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 23rd day of the month of October 2010.
(Signed): Felipe González, President; Dinah Shelton, Second Vice-President; Luz Patricia Mejía Guerrero, María Silvia Guillén, and José de Jesús Orozco Henríquez, Members of the Commission.