

REPORT No. 128/10¹
PETITION P-265-05
ADMISSIBILITY
ROSA HERNANDES SUNDERMANN and JOSÉ LUIS SUNDERMANN
BRAZIL
October 23, 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 alleging the international responsibility of the Federative Republic of Brazil (hereinafter “the State” or “Brazil”) for the killing of Rosa Hernandez Sundermann and José Luis Sundermann (“the alleged victims”) in 1994, and for the alleged neglect in the police investigation of this double homicide. The petition was filed by the daughter of the alleged victims, Raquel Sundermann, and by attorney Américo Astuto Rocha Gomes (“the petitioners”).

2. The petitioners claim that, on June 12, 1994, the alleged victims were killed in their home, in the municipality of São Carlos, state of São Paulo, and everything points to a politically motivated crime, possibly involving extermination groups in which State agents are suspected to have participated. According to the petitioners, the crime was perpetrated because of the political and trade union activism of the alleged victims. The petitioners observed that State authorities have been negligent in investigating the facts and conclude that, 14 years after the crime, there has been unwarranted delay in rendering a judgment under domestic remedies. As a consequence, they contend that Brazil has violated Articles 1.1, 4 and 25 of the American Convention on Human Rights (“the American Convention”).

3. The State alleges that the petition is inadmissible because domestic remedies have not been exhausted pursuant to the requirements of Article 46.1.a of the American Convention. On the one hand, the State indicates that the investigation conducted by the Civil Police was archived as a result of a court ruling, but that said ruling did not exhaust remedies under domestic law. On the other hand, the State claims that the next of kin of the alleged victims did not file a lawsuit for compensation for civil damages. On the basis of the above, Brazil states that the petition is inadmissible.

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 declares that the petition is admissible as regards the alleged violation of Articles 4 and 25 of the American Convention, in keeping with the general obligations set forth in Article 1.1; as well as with respect to the alleged violation of Articles 8 and 16 of the same treaty by virtue of the principle of *iura novit curia*. The IACHR has also decided to notify the parties of this decision and to publish and include it in its Annual Report to the OAS General Assembly.

II. PROCEEDINGS BEFORE THE IACHR

5. The complaint was received on March 14, 2005, in Spanish. On June 13, 2006, the IACHR sent the relevant parts of the petition to the State and set a two-month deadline for it to submit its observations. On June 28, 2006, the State requested that the petition be sent in Brazil’s official language and the IACHR immediately proceeded to request the petitioners for the respective translation.

6. The Inter-American Commission received the translation into the Portuguese language on March 2, 2007 and sent the relevant parts to the State on April 16, 2007, once again setting a two-month deadline to submit its observations. The State remitted its reply regarding the petition on July 18 and 23, 2007.

¹ Commissioner Paulo Sérgio Pinheiro, a Brazilian national, did not participate in the deliberations or the decision regarding the present petition, in conformity with Article 17.2.a of the Commission’s Rules of Procedure.

7. Afterwards, the Inter-American Commission received additional information from each one of the parties, which was duly sent to the other: from the petitioners on October 25, 2007 and July 23, 2008; and from the State on April 30, 2008.

III. POSITION OF THE PARTIES

A. Position of the petitioners

8. The petitioners assert that the alleged victims were killed in their home at dawn on June 12, 1994, in the municipality of São Carlos, state of São Paulo. According to the petitioners, everything points to the perpetration of a political crime motivated by the political and trade union activism of the alleged victims.

9. The petitioners indicate that José Luis Sundermann had a longstanding history of participating in the trade union movement; he had been President of the Union of Employees of the Federal University of São Carlos for three terms of office, from 1986 to 1987, 1988 to 1989 and 1992 to 1993, as well as Vice-President of the above-mentioned union at the time of his death. As for Rosa Hernandes Sundermann, the petitioners indicated that she had been a noteworthy activist and political organizer of the Workers Party (*Partido dos Trabalhadores*—PT) and that subsequently she had been the founder of a new leftwing political party the United Social Party of Workers (*Partido Socialista dos Trabalhadores Unificado*—PSTU) and had been elected the PSTU's national leader 10 days before her death. The petitioners stress that the alleged victims had been involved in the struggle of rural workers, especially sugarcane cutters who had no trade union representatives, and on two occasions they had organized general strikes of sugarcane cutters: in August 1990 in the municipality of Tabatinga and in August 1993 in the municipality of Descalvado. The petitioners conclude that the political and trade union activism of the alleged victims had upset many people in power, especially the owners of the sugar mills and liquor producers in the region.

10. The petitioners observe that everything indicates that the double homicide was politically motivated, possibly involving extermination groups in which it is suspected State agents participated. According to the petitioners, the Criminal Investigation Institute of São Carlos issued a report on the reconstruction of the crime, concluding that it involved a technically accurate action carried out by one or two hit men or hired killers. The petitioners add that the couple was watching television in their home when they were surprised by the killer(s) and that nothing had been stolen. According to the same report, there were four shots, of which three accurately hit the heads of the alleged victims.

11. The petitioners stress that, despite the severity of the crime, the State has shown recurring negligence in investigating the facts, especially through its police authorities. The petitioners assert that the death of the alleged victims is related to a context of police violence and extermination groups, violence with respect to agrarian conflicts and widespread impunity connected to these facts. Indeed, the petitioners observe that there were various clues pointing to the participation of sugar mill owners and the police force in the double homicide, as well as anonymous complaints about this; nevertheless, State authorities never seriously investigated these facts and/or the possibility that they involved a political crime. The petitioners observe that the direct participation of State agents in the death of the alleged victims is a likely hypothesis, but it cannot be stated precisely for lack of due diligence in the investigation of the facts by State authorities.

12. Regarding domestic remedies, especially the police investigation conducted regarding the facts, the petitioners stress that, more than 14 years after the death of the alleged victims, the crime continues to go absolutely unpunished; therefore the exception of unwarranted delay in rendering a judgment under domestic remedies would be applicable to this petition, in accordance with Article 46.2.c of the American Convention. The petitioners also observe that the family of the alleged victims have not filed a lawsuit for compensation for civil damages because, on the one hand, the development of this type of proceeding, in practice, largely depends on the development of the criminal proceedings related to it;

on the other hand, because the petitioners do not wish a mere civil compensation but wish to combat the impunity that prevails regarding political crimes and to punish those responsible.

13. On the basis of the above, the petitioners state that there is unwarranted delay in rendering a judgment under domestic remedies and that Brazil has violated Articles 1.1, 4 and 25 of the American Convention.

B. Position of the State

14. The State alleges that the petition is inadmissible by virtue of the alleged failure to comply with the fundamental requirement set forth in Article 46.1.a of the American Convention: exhaustion of remedies under domestic law.

15. In this regard, the State asserts that the investigation conducted by the Civil Police (*Inquérito Policial* No. 989/94) was archived for the first time as a result of the court ruling of February 16, 1998 because the motive or perpetrator of the crime had not been determined. According to the State, on May 26, 1998, because of reports indicating the possible involvement of military police in the double homicide, the police investigation was reopened. Nevertheless, despite the efforts that were made, according to what was alleged by the State, the police investigation was once again archived by the court ruling of September 6, 2005, without having discovered the motive or perpetrator of the crime.

16. The State stresses that this court ruling does not exhaust remedies under domestic law. Regarding this, the State asserts that this ruling has a *rebus sic stantibus* character, and that it does not constitute *res judicata*, because if circumstances change and new evidence is submitted to the authorities, the police investigation could be opened once again. Therefore, the State contends that there is no evidence of a final judgment based on the universally accepted principle of the authority of *res judicata*, because the proceedings are still open.

17. Furthermore, regarding the alleged absence of exhaustion of remedies under domestic law, the State also claims that the next of kin of the alleged victims did not file a lawsuit for compensation for civil damages. In this regard, the State observes that the concept of domestic remedies cannot be confined to criminal law, but must also include remedies that could lead to reparations for the alleged violation of human rights.

18. On the basis of the above, the State requests that the IACHR declare the petition inadmissible for failure to meet the requirement set forth in Article 46.1.a of the American Convention.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

19. The petitioners are authorized by Article 44 of the American Convention to lodge complaints with the IACHR. The alleged victims are individual persons whose rights, as enshrined in the American Convention, the State has pledged to respect and guarantee. As for the State, the IACHR observes that Brazil is a State Party to the American Convention, which it ratified on September 25, 1992. Therefore, the Inter-American Commission is competent *ratione personae* to examine the petition.

20. The IACHR is competent *ratione materiae* because the petitioners allege violation of the rights protected by the American Convention. It also is competent *ratione temporis* because the obligation to respect and ensure the rights protected by the American Convention was already in force on the date the alleged incidents took place, from June 12, 1994 onwards. Finally, the Inter-American Commission is competent *ratione loci* because the alleged violations occurred in the territory of a State Party to the American Convention.

B. Exhaustion of domestic remedies

21. According to Article 46.1.a of the American Convention, for a petition to be admitted by the IACHR, remedies under domestic law must have been exhausted in accordance with generally recognized principles of international law.

22. Regarding the exhaustion of domestic remedies, the IACHR observes at first that, in cases such as the present one, involving criminal offenses prosecutable *sua sponte*, the suitable remedy is normally a criminal investigation and trial. The IACHR notes, in this regard, that *Inquérito Policial* No. 989/94 was archived by a court ruling on September 6, 2005², and since then to date there has been no police investigation or criminal proceedings under way for the double homicide of the alleged victims.

23. Regarding this matter, the IACHR has repeatedly decided that, in Brazil, the judicial decision to archive a police investigation is a definitive ruling, since there is no opportunity to appeal this judgment; therefore, once the investigation has been archived, for the purposes of admissibility, the requirement of exhausting domestic law remedies has been met.³

24. Therefore, the IACHR repeats its *jurisprudence constante*, which has been corroborated by the Inter-American Court of Human Rights, in the sense that in Brazil a court ruling to archive a police investigation exhausts domestic remedies, for the purposes of presenting a petition before the Inter-American Commission, because according to Brazilian law, specifically the Code of Criminal Procedure, the court ruling to archive a police investigation is not subject to appeal or any other legal remedy.⁴ As a consequence, the IACHR considers that remedies under domestic law have been exhausted, in conformity with the requirements of Article 46.1.a of the American Convention.

C. Timeliness of the petition

² See ruling of Judge João Baptista Galhardo Júnior, of September 6, 2005. Annex II of the State communication of July 23, 2007 – partial copies of the *Inquérito Policial* No. 989/94, page 1592.

³ IACHR. Report No. 37/02, Admissibility, Petition 12.001, *Simone André Diniz*, Brazil, October 9, 2002, paragraphs 25-27; Report No. 80/05, Inadmissibility, Petition 12.397, *Hélio Bicudo*, Brazil, October 24, 2005, paragraph 27; Report No. 41/07, Admissibility, Petition 998-05, *Lazinho Brambilla da Silva*, Brazil, July 23, 2007, paragraph 57; Report No. 118/09, Inadmissibility, Petition 397/04, *Nelson Aparecido Trindade*, Brazil, November 12, 2009, paragraph 22; and Report No. 119/09, Inadmissibility, Petition 398/04, *Edson Prado*, Brazil, November 12, 2009, paragraph 24.

⁴ Inter-American Court of Human Rights, *Case of Garibaldi v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 23, 2009. Series C No. 203, paragraphs 49-51. See also, *inter alia*, IACHR. Report No. 80/05, Case 12.397, Inadmissibility, *Hélio Bicudo*, Brazil, October 24, 2005, paragraph 28; and Report No. 118/09, Petition 397-04, Inadmissibility, *Nelson Aparecido Trindade*, Brazil, November 12, 2009, paragraph 23.

25. Article 46.1.b of the American Convention requires that a petition must be lodged within a period of six months from the date on which the petitioner is notified of the final judgment exhausting domestic remedies. The IACHR has decided *supra* that domestic remedies have been exhausted as a result of the court ruling of September 6, 2005. The petition was submitted on March 14, 2005, before domestic remedies had been exhausted.

26. Regarding this, the Inter-American Commission observes that, in principle, it is at the time of the approval of the report on admissibility when it should be checked whether or not the requirements have been met for this stage. Therefore, the Inter-American Commission concludes that the petition meets the requirement set forth in Article 46.1.b of the American Convention.

D. Duplication and international *res judicata*

27. There is nothing on record to indicate that the matter of the petition is pending in any other international proceeding for settlement; nor is the petition substantially the same as any petition examined by the IACHR or any other international body. Therefore, the requirements set forth in Articles 46.1.c and 47.d of the American Convention have been met.

E. Colorable claim

28. It pertains to the Inter-American Commission to determine whether the facts described in the petition tend to establish a violation of the rights guaranteed in the American Convention, in line with the requirements of Article 47.b, or whether the petition, in conformity with Article 47.c, must be considered inadmissible for being “manifestly groundless” or for being “obviously out of order.” At this stage of the proceedings, the IACHR must conduct a *prima facie* evaluation not for the purpose of establishing alleged violations of the American Convention but rather to examine whether or not the petition reports facts that could tend to establish a potential violation of rights guaranteed by the American Convention. This review does not imply a prejudgment of the merits neither does it suggest any opinion on the merits of the dispute.

29. In this regard, if the allegations of the petitioners with respect to the alleged absence of due diligence by the State in effectively investigating and punishing the incidents involving the loss of life of the alleged victims, as well as the possible direct participation of agents of the State in this loss of life, are proven to be true, the Inter-American Commission deems that, *prima facie*, they could tend to establish a violation of Article 4 of the American Convention in relation to Article 1.1 of the same instrument. Furthermore, if it is proven that the loss of life of the alleged victims went unpunished because of the lack of due diligence by the authorities in charge of the criminal investigation and proceedings, the IACHR considers that it could tend to establish a violation of Article 25 and—by virtue of the principle of *iura novit curia*—Article 8 of the American Convention, with respect to Article 1.1 of the same instrument, to the detriment of Raquel Sundermann.

30. Furthermore, the IACHR observes that it is claimed that the death of the alleged victims was motivated by their activities as political and trade union leaders. In this regard, the Inter-American Commission considers that, if proven, these facts could tend to establish—by virtue of the principle of *iura novit curia*—a violation of the right to freedom of association⁵ as provided for in Article 16 of the American Convention.

31. Therefore, the IACHR decides that the petition is not “manifestly groundless” nor is it “obviously out of order,” and as a result declares that the petitioners have met *prima facie* the requirements set forth in Article 47.b of the American Convention with regard to a potential violation of

⁵ See, *mutatis mutandi*, IACHR. Report No. 9/08, Admissibility, Petition 12.332, *Margarida Maria Alves*, Brazil, March 5, 2008, paragraphs 53-55; Report No. 71/08, Admissibility, Petition 1290-04, *José Dutra da Costa*, Brazil, Brazil, October 16, 2008, paragraph 47; and Report No. 73/08, Admissibility, Petition 1236-06, *Gabriel Sales Pimenta*, Brazil, October 17, 2008, paragraph 36.

Articles 4, 8, 16 and 25 of the American Convention, in relation to Article 1.1 of the same international instrument.

V. CONCLUSIONS

32. The Inter-American Commission concludes that it is competent to review the merits of the present case and that the petition is admissible in conformity with Articles 46 and 47 of the American Convention. Based on the arguments of fact and law set forth above and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present petition admissible as regards the alleged violation of the rights protected by Articles 4 and 25 of the American Convention, in connection with the general obligations enshrined in Article 1.1 of this treaty;

2. To declare the present petition admissible—in accordance with the principle of *iura novit curia*—as regards the possible violation of the rights protected by Articles 8 and 16 of the American Convention in connection with the general obligations enshrined in Article 1.1 of this treaty;

3. To notify the parties of this decision;

4. To proceed with the examination of the merits of the case; and

5. 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 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.