

REPORT No. 146/11*
PETITION 405-07
ADMISSIBILITY
HILDEBRANDO SILVA DE FREITAS
BRAZIL
October 31, 2011

I. SUMMARY

1. On April 3, 2007, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the IACHR”) received a petition submitted by the Pará Society for the Defense of Human Rights (*Sociedade Paraense de Defesa dos Direitos Humanos – SDDH*) and the Center for Justice and International Law – CEJIL (“the petitioners”) alleging that the Federative Republic of Brazil (“the State” or “Brazil”) was internationally responsible for the arbitrary detention, torture and violation of the personal integrity of Hildebrando Silva de Freitas (“the alleged victim”), in Belém, Pará state.

2. According to the petitioners, the alleged victim was arbitrarily arrested by police officers on November 15, 1997, when they were trying to close his nightclub. The petitioners indicate that the alleged victim was charged on the basis of a *desacato* provision contained in the Brazilian Criminal Code, because he questioned the actions of the police, and he was not immediately informed of the charges against him. The petitioners also allege that from the moment of his initial arrest and during his detention at a police station, the alleged victim was subjected to violence at the hands of State police agents that amounts to torture and violations of his personal integrity. The petitioners add that, despite the alleged victim’s complaints to the competent authorities, an official independent inquiry into the facts was not promptly initiated and, as of the present day, the State has left the alleged violations unpunished. The petitioners conclude that the alleged facts constitute a violation of Articles 1.1, 5, 7, 8 and 25 of the American Convention on Human Rights (“the American Convention”), as well as violations of the Inter-American Convention to Prevent and Punish Torture (Articles 1, 2, 3, 4, 6 and 8).

3. For its part, the State alleges that the petition is inadmissible because domestic remedies have not been exhausted, as required by Article 46.1.a of the American Convention, since the alleged victim did not pursue a civil action for compensatory damages. Moreover, Brazil argues that the petitioners have failed to state facts that tend to establish a violation of the American Convention, thus the petition is also inadmissible in conformity with Article 47.b of that treaty. In this regard, the State observes that there is no credible evidence that the alleged victim suffered torture or violation of his personal integrity at the hands of police officers.

4. After examining the positions of the parties in light of the admissibility requirements established in Articles 46 and 47 of the American Convention, and without prejudging the merits of the matter, the IACHR declares this petition admissible with regard to the alleged violation of Articles 5, 7, 8, 13 and 25 of the American Convention, in conjunction with Articles 1.1 and 2 of the same instrument, and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. Finally, the IACHR decides to 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

5. The petition was received by the IACHR on April 3, 2007, and its annexes on April 16, 2007. The IACHR sent the pertinent parts of the petition to the State on March 27, 2008. On July 15, 2008 the State submitted its response to this petition, and on July 22, 2008 the IACHR received its

* Commissioner Paulo Sérgio Pinheiro, of Brazilian nationality, did not participate in the deliberations or in the decision of this report, in keeping with the provisions of Article 17.2.a of the Rules of Procedure of the IACHR.

annexes. The petitioners submitted a communication with additional observations on September 2, 2008, which was duly transmitted to the State.

III. POSITION OF THE PARTIES

A. Position of the petitioners

6. The petitioners allege, as a contextual matter, that torture is a systematic and widespread practice in Brazil, mostly associated with the police forces. This, according to them, is notwithstanding the State's ratification --since the late 1980s-- of the main international instruments that outlaw torture, as well as the adoption of domestic legislation regarding torture in 1997 (Law 9.455/97). In this regard, the petitioners also observe that the police investigations into complaints about torture perpetrated by the police lack due diligence, independence and rely on precariously collected forensic evidence, all of which leads to those acts remaining in impunity. The petitioners assert that those conclusions are demonstrated by expert and official studies into the topic, such as the Report of the United Nations Special Rapporteur on Torture on his 2000 Mission to Brazil, and the 1st State Report on its compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Ministry of Justice, 2000). Moreover, at the time of the alleged events, the petitioners observe that the Police Ombudsman's Office (*Ouvidoria*) in Pará state created in 1996 also collected data corroborating the aforementioned conclusions.

7. The petitioners maintain that the alleged victim was the owner of a nightclub named "Casa de Samba Cadência", in the Telégrafo neighborhood, in Belém, Pará. On November 15, 1997, according to the petitioners, civil and military police officers showed up at the nightclub in order to have it closed for the alleged lack of the appropriate license. The petitioners claim that the alleged victim tried to reason with the police, and was therefore arrested for *desacato*.

8. The petitioners indicate that from the moment of his initial arrest, the alleged victim was physically beaten with a blow in the back of his head. Later on, according to the petitioners, at the Telégrafo Police Station he was taken to a cell where he was beaten by several police officers who hit him in the ribcage, left eye, chest and waist. At the police station, the petitioners contend that the police officers also encouraged other detainees to threaten to rape the alleged victim, in order to terrorize and intimidate him. The petitioners maintain that the alleged victim was not promptly informed of the charges against him, and was kept confined in a cell until the following morning, when he was finally notified of the charges against him and released on bail.

9. After the alleged victim was released, the petitioners indicate that he went to the Forensic Medicine Institute (*Instituto Médico Legal*) for a physical examination, which corroborated that he had suffered physical violence while in State custody. Five months later, on April 14, 1998, according to the petitioners, the alleged victim underwent a complementary physical examination which indicated that the physical violence suffered in November 1997 might have caused permanent internal damage. Nevertheless, the petitioners stress that these forensic examinations were superficial and lacked proper and detailed analyses, in conformity with international standards for the investigation of torture allegations.

10. According to the petition, the alleged victim denounced the facts immediately after his release, on November 16, 1997, before both the Civil Police Internal Affairs Division (*Corregedoria*) and the Police Ombudsman (*Ouvidoria de Polícia*). The petitioners state that, in view of the foregoing, an administrative investigation was initiated by the *Corregedoria* but it was ultimately archived, on January 23, 1998, because it concluded that the police had acted "in the strict line of duty". The petitioners emphasize that, during this administrative investigation, the Police Ombudsman herself identified several irregularities, including the undue interference of police officers who allegedly participated in the arrest and beating of the alleged victim.

11. As regards the criminal investigation and process opened to investigate the allegations against the police, the petitioners stress that the Public Ministry requested an inquiry into the facts alleged

herein one month later, on December 17, 1997; and that the police inquiry was only instituted six months later, on June 1, 1998. According to the petitioners, this inquiry was concluded by the police on September 18, 1998 and the recommendation made by the police authority was that the case be archived, allegedly due to the lack of evidence regarding the perpetrators of the violence suffered by the alleged victim. The petitioners indicate that the two prosecutors who subsequently received the police investigation files disagreed as to whether torture had actually occurred, but the case was ultimately archived by the competent judicial authority on September 20, 1999. The reasoning for archiving the case, according to the petitioners, was that the alleged victim had self-inflicted his wounds upon resisting arrest.

12. On June 2, 2000, one of the petitioners, the Pará Society for the Defense of Human Rights presented new evidence to the authorities on behalf of the alleged victim --namely statements from three new witnesses-- and obtained the reopening of the investigation by virtue of a judicial decision issued on June 14, 2000. According to the petitioners, on that same date, the Public Ministry presented the respective judicial indictment charging 6 police officers with torture against the alleged victim. The petitioners indicate that the judicial authority formally accepted the indictment on June 19, 2000, but after a series of interlocutory appeals interposed by the defendants, the indictment was rejected by a judicial decision handed down on August 25, 2003. The petitioners observe that the Public Ministry presented no appeals against this decision, thus the alleged victim presented an appeal (*recurso em sentido estrito*) on November 10, 2003. However, this appeal was rejected on February 21, 2006 on the basis that --in the absence of an appeal by the Public Ministry-- the alleged victim and his representatives, acting as Assistants to the Prosecution (*Assistentes de Acusação*), had no legal standing to present such an appeal autonomously according to domestic procedural law. The petitioners indicate that the judgment on this matter became final on October 17, 2006. They therefore contend that this petition fulfills all the admissibility requirements, since domestic remedies were pursued and exhausted, and the petition was lodged within six months from the final judgment.

13. Based on these considerations, the petitioner alleges that the State is responsible for the violation of Articles 1.1, 5, 7, 8 and 25 of the American Convention, and Articles 1, 2, 3, 4, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

B. Position of the State

14. The State asserts that the petition is inadmissible because domestic remedies have not been exhausted, as required by Article 46.1.a. of the American Convention. In this regard, the State contends that the alleged victim did not pursue a civil action for compensatory damages.

15. In addition to that, the State maintains that, in conformity with Article 47.b, the petition does not state facts that tend to establish a violation of the rights guaranteed by the American Convention. According to the State, after a noise complaint regarding the alleged victim's nightclub, police officers notified the alleged victim that he had to close his establishment for the night, and also verified that it did not bear the appropriate license for functioning. The State alleges that the alleged victim addressed the police disrespectfully and refused to close his nightclub, which led to his arrest for *desacato*. Moreover, Brazil argues that the alleged victim resisted arrest and even physically assaulted one of the police officers and that he was accordingly charged with *desacato*, disobedience and resistance to arrest. The State stresses that the investigations into the alleged victim's torture allegations were inconclusive and the evidence indicated that the wounds observed on him were compatible with resistance to arrest and/or self-inflicted wounds. Consequently, the indictment presented by the Public Ministry was rejected and this decision became final on October 17, 2006, which indicates, according to the State, that torture did not occur.

16. Based on these two considerations, the State requests that the IACHR declare this petition inadmissible by virtue of the admissibility requirements enshrined in Articles 46.1.a and 47.b of the American Convention.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

17. In accordance with Article 44 of the American Convention and Article 23 of the Rules of Procedure of the IACHR, the petitioners have *locus standi* to submit a petition before the Inter-American Commission. The petition identifies as its alleged victim Hildebrando Silva de Freitas, an individual regarding whom the State agreed to respect and ensure the rights enshrined in the American Convention. As regards the State, the Federative Republic of Brazil ratified the American Convention on September 25, 1992 and the Inter-American Convention to Prevent and Punish Torture on July 20, 1989, thus the Inter-American Commission has competence *ratione personae* to examine the petition. Under Article 23 of its Rules of Procedure, the Inter-American Commission has competence *ratione materiae* to examine this petition, since it refers to alleged violations of human rights recognized in the American Convention and the Inter-American Convention to Prevent and Punish Torture.

18. With regard to *ratione temporis* jurisdiction, the IACHR notes that the alleged facts took place on November 15, 1997, after Brazil's ratification of both the American Convention and the Inter-American Convention to Prevent and Punish Torture. Finally, the American Commission has *ratione loci* competence to examine the petition insofar as it alleges violations of rights protected by the American Convention and the Inter-American Convention to Prevent and Punish Torture that supposedly took place within the territory of a State Party.

B. Exhaustion of domestic remedies

19. Under Article 46.1.a of the American Convention, for a petition to be admitted by the Inter-American Commission, the remedies offered by domestic jurisdiction must have been exhausted in accordance with generally recognized principles of international law. The IACHR reiterates that in cases involving a denunciation of torture, which is a criminal offense prosecutable *sua sponte* in Brazil, the suitable and effective remedy is normally a criminal investigation and trial,¹ which is the suitable and adequate remedy. It is an undisputed fact in the instant case that the denunciation and criminal investigations led to the presentation of an indictment by the Public Ministry which was eventually rejected by the judicial authority, and this judgment became final on October 17, 2006.

20. In addition to the foregoing, the IACHR observes that the State's argument of non-exhaustion of domestic remedies refers exclusively to a civil action for compensatory damages, which -- in the opinion of the Inter-American Commission -- is not a suitable or effective remedy regarding allegations of torture, since it could not lead to ensuring the prosecution and punishment of those responsible. Based on those considerations, the Inter-American Commission concludes that domestic remedies were exhausted, thus the requirement established by Article 46.1.a of the American Convention has been met.

C. Timeliness of the petition

21. Article 46.1.b of the American Convention requires that petitions be lodged within a period of six months following notification of the final judgment. The IACHR notes that this petition was presented on April 3, 2007, less than six months from the final judgment of October 17, 2006, therefore, it meets the requirement set forth in Article 46.1.b of the American Convention

D. Duplication of proceedings and international *res judicata*

22. The case file does not indicate that the issue addressed in the petition is pending before any other international proceeding, nor that it reproduces a petition that has already been heard by this or

¹ See, *inter alia*, IACHR. Report No. 6/10, Petition 262-05, Admissibility, *José do Egito Romão Diniz*, Brazil, March 10, 2010, para. 24; and Report No. 41/10, Petition 999-06, Admissibility, *Adão Pereira de Souza and Clotilde de Souza Rocha*, Brazil, March 17, 2010, para. 22.

any other international body. Accordingly, the requirements established in Articles 46.1.c and 47.d of the American Convention have been met.

E. Colorable claim

23. For purposes of admissibility, the Inter-American Commission must determine if the facts described in the petition tend to establish a violation of the rights enshrined in the American Convention or other applicable instruments, or if the petition must be rejected for being “manifestly groundless” or “obviously out of order,” in keeping with the requirements of Articles 47.b and 47.c of the American Convention. At this procedural stage, the IACHR must conduct a *prima facie* evaluation, not with the purpose of establishing alleged violations of the applicable inter-American human rights instruments, but rather to examine whether the petition denounces facts that could potentially comprise violations of rights guaranteed therein. This examination does not imply a prejudgment or an anticipation of the ruling on the merits in this matter.

24. Neither the American Convention nor the IACHR Rules of Procedure require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. It is for the Commission, based on the system's jurisprudence, to determine in its admissibility report which provisions of the relevant Inter-American instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements.

25. In this case, the Inter-American Commission observes that, if proven to be true, the petitioners' allegations regarding the direct responsibility of State police agents for torturing and physically assaulting the alleged victim, could tend to establish violations of Article 5 of the American Convention, as well as violations of the Inter-American Convention to Prevent and Punish Torture. With regard to the latter, the IACHR is mindful that Articles 2, 3 and 4 of that instrument are conceptual provisions that do not refer to substantive rights guaranteed to alleged victims of violations of that instrument.² In view of the foregoing, the Inter-American Commission decides that the petitioners' 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 and 8 of the Inter-American Convention to Prevent and Punish Torture. In addition, should the allegations regarding the lack of independence and due diligence in the criminal investigations be proven, they could tend to establish violations of Articles 8 and 25 of the American Convention.

26. With regard to the contention that the alleged victim was arrested under a *desacato* provision in Brazilian Criminal Law (Article 331 of the Brazilian Criminal Code: “Disrespect – *desacatar* – a civil servant in line of duty or by virtue thereof”), because he questioned the actions and the prerogatives of the police officers who were attempting to close his nightclub, the Inter-American Commission observes that it has previously found that *desacato* laws are incompatible with the American Convention because they lend themselves to abuse and give a higher level of protection to public officials than is offered to private citizens.³

27. In this case, therefore, with regard to the existence of the aforementioned criminal provision, its allegedly broad scope and concrete application to the alleged victim with the consequent criminal charges for *desacato*, the IACHR decides that they might constitute a violation of Articles 7 and 13 of the American Convention. Both these provisions are admissible in conjunction with the general obligation to adopt measures to give effect to those rights, under Article 2 of the American Convention.

28. In conclusion, the IACHR decides that the petition is not “manifestly groundless” or “obviously out of order” and, as a result, declares that the petitioners have met the *prima facie*

² See IACHR. Report No. 6/10, Petition 262-05, Admissibility, *José do Egito Romão Diniz*, Brazil, March 10, 2010, para. 31.

³ See, *inter alia*, IACHR. Report on the Compatibility of *Desacato* Laws with the American Convention on Human Rights, February 17, 1995, paras. 197-212.

requirements set by Article 47.b of the American Convention as regards potential violations of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, as well as of Articles 5, 7, 8, 13 and 25 of the American Convention, in conjunction with Articles 1.1 and 2 of the same international instrument.

V. CONCLUSIONS

29. 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 arguments of fact and law herein set forth, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS DECIDES:

1. To declare this petition admissible with regard to the rights protected in Articles 5, 7, 8, 13 and 25 of the American Convention, in relation to Articles 1.1 and 2 of the same instrument;
2. To declare this petition admissible as regards potential violations of the rights protected in Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture;
3. To notify the parties of this decision, and to continue with the analysis of the merits of the matter; and
4. To publish this report and include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on October 31, 2001. (Signed): Dinah Shelton, President; José de Jesús Orozco Henríquez, First Vice-President; Rodrigo Escobar Gil, Second Vice-President; Felipe González, Luz Patricia Mejía Guerrero, and María Silvia Guillén, Commissioners.