

**REPORT No. 8/12**  
PETITION P-302-07  
FLAVIO MENDES PONTES *ET AL.*  
ADMISSIBILITY  
BRAZIL  
March 20, 2012

**I. SUMMARY**

1. On March 14, 2007, 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 the alleged extrajudicial execution of 16-year-old Flavio Mendes Pontes (“the alleged victim”) at the hands of military police officers from the state of Rio de Janeiro. The petition also denounced the effect of those violations on the members of his family, including his mother, Joana D’Arc Mendes, and his brother, Douglas Mendes Pontes (jointly, “the alleged victims”). The petition was presented by the Human Rights Unit of the Rio de Janeiro Public Defender’s Office (“the petitioner”).

2. The petitioner claims that the alleged victim was executed by police officers from the Rio de Janeiro Military Police, on March 30, 2004. The petitioner reports that the Public Prosecutor’s Office filed criminal charges against three officers of the Military Police on April 5, 2004; and that since then the three accused were tried at first instance, with a first instance conviction handed down against only one of them. According to the petitioner, the appeal that was lodged remains unresolved. The petitioner therefore maintains that seven years have passed since the execution of the alleged victim and the State has not yet duly punished the persons responsible through a final judicial ruling. Consequently, the petitioner argues that Brazil has violated Articles 4, 5, 24 and 25 of the American Convention on Human Rights (“the American Convention”) to the detriment of the alleged victims.

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 process for the death of the alleged victim. Moreover, the State claims that domestic remedies in the civil sphere have not been exhausted either, since there is also a pending civil process for compensatory damages against the state of Rio de Janeiro.

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 this petition admissible with respect to potential violations of Articles 4, 5, 8, 19 and 25 of that international instrument, in conjunction with the general obligation established by Article 1.1 thereof. On the other hand, the IACHR declares this petition inadmissible as regards the alleged violation of Article 24 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

5. The petition was received on March 14, 2007. On May 8, 2007, the IACHR forwarded the relevant parts of the petition to the State. The State replied by means of notes received by the IACHR on August 24 and September 4, 2007. The IACHR duly submitted these communications to the petitioner.

6. The petitioner submitted additional information on December 6, 2007 and February 24, 2011. These communications were duly submitted to the State. The State submitted additional information on February 25, 2008, and this communication was duly submitted to the petitioner.

## III. POSITION OF THE PARTIES

### A. Position of the petitioner

7. According to the petitioner, on March 30, 2004, three military police officers – Fabiano Gonçalves Lopes, José Augusto Moreira Felipe, and Jefferson Machado de Assis – invaded the residence of Ms. Joana D’Arc Mendes, in Itaguaí, Rio de Janeiro state, in the afternoon, under the pretext of searching for drugs. The petitioner states that the military police were also looking for one of Ms. Mendes’ sons, 16-year-old Flavio Mendes Pontes, who was not home at the time. The petitioner alleges that a while later, as the military police were still in the alleged victims’ front yard, Flavio arrived home and was immediately approached by the police officers, who started questioning him. After that, the petitioner states that Ms. Mendes heard a gunshot and saw Flavio running away from the military police officers, who shot at him seven more times. The petitioner alleges that Flavio fell to the ground, and then the police officers shot at him four more times. According to the petitioner, under the protests of Ms. Mendes, Flavio was put into a police vehicle while the police officers claimed that they were going to “take him to the hospital.” However, the petitioner alleges that once inside the vehicle, the police officers shot at the alleged victim three more times. According to the petitioner, Flavio died as a result of the gunshots. Ms. Mendes’ other son, Douglas Mendes Pontes, allegedly also witnessed his brother’s execution.

8. The petitioner claims that this is not an isolated case of police violence, but rather illustrates a pattern of violent acts of the security forces in Rio de Janeiro, particularly the Military Police, which in most cases remain in impunity. In this regard, the petitioner alleges that the Office of the Public Prosecutor presented an indictment against the aforementioned military police officers for the homicide of the alleged victim, on April 5, 2004, but this criminal process remains pending to this date, seven years after the facts. According to the petitioner, on August 30, 2005, the criminal judge in charge decided to dismiss the charges (*Sentença de Impronúncia*) regarding one of the police officers, while confirming the charges against the other two so that they would be tried by a Jury Tribunal (*Sentença de Pronúncia*). The decision to submit two police officers to a jury trial, according to the petition, was appealed (*recurso em sentido estrito*), and after that the process remained suspended for over one year. The petitioner argues that the judicial authorities acted without the necessary due diligence to move the process forward.

9. On June 26, 2008, according to the petitioner, military police officer José Augusto Moreira Felipe was acquitted by a jury, and this decision was confirmed on appeal. The petitioner adds that, in a separate trial which took place on December 10 and 11, 2009, military police officer Fabiano Gonçalves Lopes was convicted and sentenced to 14 years in prison for the death of the alleged victim. Nevertheless, the petitioner asserts that the defendant presented an appeal (*Apelação*) which remains pending. Therefore, the petitioner argues that there is no one convicted for the extrajudicial execution of the alleged victim by means of a final judgment.

10. In addition to the foregoing, the petitioner indicates that, under the representation of the Public Defender’s Office, Ms. Mendes also instituted a civil lawsuit for compensatory damages against the state of Rio de Janeiro, on July 26, 2004. This civil process, according to the petitioner, has yet to be decided at first instance and remains pending to this date, due to the absence of a final criminal judgment. In this regard, the petitioner observes that, although criminal and civil processes are

theoretically independent in Brazil, in this case the judicial authority decided to suspend the civil process until the plaintiff presents proof of a final criminal judgment, in order to decide upon the objective responsibility of the State for the death of the alleged victim.

11. The petitioner adds that the impunity observed in this case, as well as the lack of a favorable decision regarding monetary compensation to the alleged victim's family, has caused a great impact on the alleged victim's next-of-kin. In this respect, the petitioner alleges that witnessing the alleged victim's execution caused both Ms. Mendes and her other son, Douglas, great psychological trauma. Also, the petitioner argues that Ms. Mendes has developed several health problems as a consequence of the facts, and both she and her son Douglas had to be included in the Witness Protection Program (PROVITA).

12. In conclusion, the petitioner argues that, seven years after the alleged victim's extrajudicial execution, there is no final criminal judgment punishing those responsible, nor is there any judicial decision regarding civil compensation for the alleged victim's family. Based on the foregoing, the petitioner claims that there has been unwarranted delay in rendering a final judgment regarding the facts denounced in this petition, so it is admissible according to Article 46.2.c of the American Convention. The petitioner also concludes that, as a result of the extrajudicial execution of the alleged victim and the impunity observed thereof, the State has violated Articles 4, 5, 24 and 25 of the American Convention.

#### **B. Position of the State**

13. 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 criminal process regarding the death of the alleged victim, which indicates that the presentation of the petition before the IACHR was premature. The State observes that criminal process no. 2004.024.001570-5, against defendants Fabiano Gonçalves Lopes and José Augusto Moreira Felipe, both of whom are military police officers, is ongoing and is following its due course. The State stresses that, during the evidentiary stage of this criminal process, its judicial authorities took all the required measures to adequately investigate the death of the alleged victim.

14. Moreover, the State claims that domestic remedies in the civil sphere have not been exhausted either, since there also is a pending civil process for compensatory damages against the state of Rio de Janeiro (no. 2004.001.089686-3). The State observes in this regard that although criminal and civil processes are independent in Brazil, if the criminal process categorically denies that a crime took place or if it cannot determine the authorship of a crime, the corresponding civil lawsuit must be rejected. Consequently, the State indicates that the judicial authority in charge of the criminal process decided as a precaution to suspend the civil process until there is a final criminal judgment.

15. Based on the foregoing, the State concludes 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

16. 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 recognized in that international instrument. 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.

17. 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

18. 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.

19. Preliminarily, the Inter-American Commission observes that in cases such as the one at hand, which allegedly involve a criminal offense prosecutable *sua sponte* in Brazil --namely a death alleged to have been an extrajudicial execution-- the suitable and effective remedy is normally a criminal investigation and trial before the ordinary judicial system. The IACHR notes that it is an undisputed fact that to this date there is no final judgment regarding the alleged victim's death (*supra* paras. 8 and 12) and no one has been punished for the violations denounced in this petition. The records also indicate that in the prosecution for the crime of doubly aggravated murder, one of the three accused military police officers was convicted and sentenced to 14 years in prison, by means of a first instance decision handed down on December 11, 2009.<sup>1</sup> This decision was appealed and, according to information provided by both parties, the appeal has not yet been resolved.

20. For the purpose of its admissibility ruling, the Inter-American Commission must take into account that the execution of the alleged victim took place on March 30, 2004, almost eight years ago. The criminal proceedings brought against the alleged perpetrators have not yet concluded, and the State has presented no specific information on particular circumstances applicable to this case that could justify, for admissibility purposes, the length of time that has gone by since the killing of the alleged victim and during which the domestic courts have not issued a final criminal judgment.<sup>2</sup> Moreover, the IACHR notes that the petitioner alleged, and the State confirmed (*supra* paras. 9 and 13), that the related civil process has been suspended due to the lack of a final criminal judgment, so the alleged victim's next-of-kin have received no reparation for the violations denounced.

21. In that regard, 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

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<sup>1</sup> Copies of criminal process no. 2004.024.001570-5 – Attachment of the Petitioner's communication of February 24, 2011. Pages 101-121.

<sup>2</sup> See, *mutatis mutandi*, IACHR, Report No. 61/09, Petition 373-03, Admissibility, *Josenildo João de Freitas Jr. et al.* (Brazil), July 22, 2009, para. 29.

defenseless victim ineffective.”<sup>3</sup> In the matter at hand, since the death of the alleged victim took place on March 30, 2004, the prior exhaustion requirement cannot be interpreted in a way that would cause a prolonged or unjustified restriction in access to the inter-American human rights system. Having closely examined the files of the criminal process, the IACHR rules that there has been an unwarranted delay in rendering a final judgment, and that the exception provided for in Article 46.2.c of the American Convention is applicable.

22. Finally, it must be pointed out that the unwarranted delay exception is closely related to 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.<sup>4</sup>

### **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 March 14, 2007, roughly three years after the death of the alleged victim and before first instance decisions were handed down by two separate jury trials, on June 26, 2008 and December 10, 2009.<sup>5</sup> Given the specific circumstances of this petition, and also taking into account the allegations of denial of justice and impunity which supposedly continue to this date, 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 international *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**

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<sup>3</sup> I/A Court H. R., *Velásquez Rodríguez Case*. Preliminary Objections, Judgment of June 26, 1987, Series C No. 1, para. 93.

<sup>4</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.

<sup>5</sup> Copies of criminal process no. 2004.024.001570-5 – Attachment of the Petitioner’s communication of February 24, 2011. Pages 94-96 and 101-121, respectively.

26. For purposes of admissibility, the Inter-American Commission must determine whether the facts denounced 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.<sup>6</sup>

27. Neither the American Convention nor the IACHR’s Rules of Procedure require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Inter-American 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.

28. In this case, the petitioner claims that the alleged victim, a 16-year-old boy, was summarily executed by Rio de Janeiro military police officers. The petitioner also argues that the crime has remained in impunity, since there has been no final criminal judgment to this date. The Inter-American Commission concludes that, should those allegations be proven true, they would tend to establish a violation of Articles 4, 8, 19 and 25 of the American Convention, in conjunction with the obligation to respect rights provided for in Article 1.1 of the same instrument. Moreover, given the nature of the alleged violations described in this petition, particularly the fact that both the alleged victim’s mother and brother supposedly witnessed his killing, which caused them great psychological harm, and that they both had to be included in a Witness Protection Program, among other factors, the Inter-American Commission decides that those elements could tend to establish violations of Article 5.1 of the American Convention to the detriment of the family members of the alleged victim, including Joana D’Arc Mendes (mother), Douglas Mendes Pontes (brother), and others who might be identified at the merits stage.<sup>7</sup>

29. On the other hand, the IACHR considers that the petitioner has not presented basic elements to establish *prima facie* a claim concerning a potential violation of Article 24 of the American Convention; thus this petition is inadmissible in this respect, in conformity with Article 47.b of the American Convention.

30. 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, 19 and 25 of the American Convention, in conjunction with Article 1.1 of the same instrument, as detailed above.

## V. CONCLUSIONS

31. 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

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<sup>6</sup> IACHR, Report No. 61/09, Petition 373-03, Admissibility, *Josenildo João de Freitas Jr. et al.* (Brazil), July 22, 2009, para. 36.

<sup>7</sup> See IACHR. Report No. 126/10, Petitions 1448-06, 1452-06, 1458-06 and 65-07, Admissibility, *Roberto Carlos Pereira de Souza et al.* (Brazil), October 23, 2010, para. 64; Report No. 38/10, Petition 1198-05, Admissibility, *Ivanildo Amaro da Silva et al.* (Brazil), March 17, 2010, para. 40; and Report No. 61/09, Petition 373-03, Admissibility, *Josenildo João de Freitas Jr. et al.* (Brazil), July 22, 2009, para. 38.

**DECIDES:**

1. To rule this petition admissible as regards the alleged violation of the rights protected in Articles 4, 5, 8, 19 and 25 of the American Convention, in conjunction with Article 1.1 of the same instrument;

2. To rule this petition inadmissible, with regard to the alleged violation of Article 24 of the American Convention;

3. To notify both parties about this decision;

4. To continue with its analysis of the merits of this case;

5. 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 20<sup>th</sup> day of the month of March 2012.  
(Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Felipe González, Second Vice-President; Dinah Shelton, Rodrigo Escobar Gil, Rosa María Ortiz, and Rose-Marie Antoine, Commissioners.