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REPORT No. 4/19
PETITION 673-11
REPORT ON ADMISSIBILITY

FERNANDO ALCÂNTARA DE FIGUEIREDO
AND LACI MARINHO DE ARAÚJO
BRAZIL

Approved electronically by the Commission on January 3, 2019.

Cite as: IACHR, Report No. 4/19. Petition 673-11. Admissibility. Fernando Alcântara de Figueiredo and Laci Marinho de Araújo. Brazil. January 3, 2019.



I. INFORMATION ABOUT THE PETITION

Petitioner:	Center for Justice and International Law
Alleged victims:	Fernando Alcântara de Figueiredo and Laci Marinho de Araújo
Respondent State:	Brazil ¹
Rights invoked:	Articles 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (judicial guarantees), 11 (protection of honor and dignity), 13 (freedom of thought and expression), 24 (equality before the law), and 25 (judicial protection), all in conjunction with Articles 1 (obligation to respect rights) and 2 (obligation to adopt domestic law provisions) of the American Convention on Human Rights and Articles 1, 2, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition:	May 16, 2011
Notification of the petition to the State:	February 11, 2014
State's first response:	June 13, 2014

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention on Human Rights (instrument deposited on September 25, 1992) and the Inter-American Convention to Prevent and Punish Torture (instrument deposited on July 20, 1989)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 5 (humane treatment), 7 (personal liberty), 8 (judicial guarantees), 11 (protection of honor and dignity), 13 (freedom of thought and expression), 24 (equality before the law), and 25 (judicial protection), all in conjunction with Articles 1 (obligation to respect rights) and 2 (obligation to adopt domestic law provisions) of the American Convention on Human Rights and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes
Timeliness of the petition:	Yes, in the terms of section VI

¹ In keeping with Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Flávia Piovesan, of Brazilian nationality, did not participate in the deliberations or decision in this matter.

² The observations submitted by each party were duly transmitted to the opposing party.

V. FACTS ALLEGED

1. This petition addresses the purported discrimination against and persecution of the alleged victims, by the Brazilian Armed Forces, based on their sexual orientation. The petitioner affirms that Fernando Alcântara de Figueiredo (hereinafter “Mr. Alcântara”) joined the Army as a recruit in 1992, becoming a sergeant by public competition in 1995, a position he held until 2008, when he was forced to request his separation from the Army. It also asserts that Laci Marinho de Araújo (hereinafter “Mr. Araújo”) joined the Army by means of public competition, also in 1995. They met when assigned to serve in the Presidential Guard Battalion, in Brasília, and subsequently at the General Hospital of Brasília, and they have maintained an affective relationship to this day.

2. It alleges that in 2003 Mr. Araújo showed symptoms of a neurological disease and did not obtain an affirmative diagnosis until August 27, 2008, when he was found to have “temporal lobe epilepsy.” Nonetheless, during that time he was seen by various physicians and different diagnoses were presented, leading to different suggested courses of action, such that at times he was considered not apt to carry out his work activities, and at other times he was considered apt with restrictions. It asserts that the Armed Forces refused to acknowledge Mr. Araújo’s illness and his need to work less or not at all. Instead, they brought disciplinary administrative proceedings against the alleged victim because of his justified absences and delays, with the underlying motivation being discrimination on grounds of his sexual orientation.

3. The petitioner notes that despite Mr. Araújo being praised for good conduct in his military record, in July 2006 a process of persecution of the alleged victim began through administrative proceedings that culminated in the application of disciplinary sanctions and judicial proceedings for desertion, slander, and contempt of public authorities. Petitioner further notes that during the time the persecution lasted, Mr. Araújo was suffering symptoms of his illness at the same time as he sought a diagnosis. In a similar context, it states that Mr. Alcântara was also a victim of discrimination, which led to his removal from the Army and charges of malicious prosecution (*denunciação caluniosa*) for pointing out corruption at the General Hospital of Brasília.

Disciplinary proceedings against Mr. Araújo

4. The petitioner asserts that those actions were seen as psychological torture by the alleged victim who asserted at trial that he developed panic syndrome as a result of the persecution he suffered. It states that as a consequence of an administrative complaint filed by Mr. Araújo with the director of the General Hospital of Brasília, an inquiry was begun to verify his current health condition. On November 30, 2006, the final report of the inquiry found that the alleged victim was “apt with recommendations” to perform his work, and a new disciplinary proceeding was begun for supposedly having invented the facts alleged.

5. On October 16, 2006, Mr. Araújo filed a special constitutional remedy (*mandado de segurança*) requesting a preliminary injunction, before the federal courts, against the acts of his superiors at the General Hospital of Brasília, who rejected all the reports, certifications, and medical recommendations that called for him to take a leave from work. He argues that his superiors determined that the alleged victim should continue doing his job with its work schedule. In that action the alleged victim asserted that those arbitrary acts were intrinsically related to his sexual orientation. The motion for a preliminary injunction was dismissed on October 17, 2006, and from that moment the alleged victim saw that there was no possibility of denouncing the discriminatory acts without suffering reprisals.

6. Additionally, the petitioner asserts that after an anonymous complaint attributed to Mr. Alcântara regarding financial fraud by the management of the General Hospital of Brasília, the Director of Control of Troops and Movements of the General Command in Brasília decided to transfer the alleged victims to different states of Brazil. Due to a representation by Mr. Araújo’s mother, Ms. Francinete Marinho de Araújo, on September 18, 2007, the Federal Office of Public Prosecutor filed a public civil action for administrative corruption (*Ação Civil Pública por Improbidade Administrativa*) with a request for anticipated protection, considering that the transfer order was discriminatory. The anticipated protection was granted by the federal

courts on October 9, 2007, blocking the transfer of both of them. Nonetheless, the action was ruled out of order on February 7, 2011.

Desertion proceeding against Mr. Araújo

7. On June 13, 2008, the Office of the Military Prosecutor initiated a desertion proceeding against Mr. Araújo for not having appeared at the battalion for eight consecutive days, even though he presented a medical certificate to justify his absence. The petitioner asserts that on May 21, 2008, it was decided to carry out a search and arrest at the home of the alleged victims, resulting in the destruction of several items of their property by members of the Army's Criminal Investigations Unit (Pelotão de Investigações Criminais). That same day Mr. Alcântara recorded an incident report on that action carried out by the State. Petitioner further emphasizes that at one point the image of the alleged victim was shown in the media with the instruction for his arrest, and warning the population about his "mental illness" and his "dangerousness."

8. The petitioner notes that faced with the impossibility of denouncing the acts of their superiors without suffering reprisals, the alleged victims went to the press. An interview with both of them was the cover story of a national circulation magazine on June 2, 2008, at which time they publicly assumed their sexual orientation. On June 3, 2008, the alleged victims were interviewed on a television program broadcast nationwide, at which time the Army surrounded the television station with the objective of taking Mr. Araújo with an arrest warrant issued a short time earlier. It argues that the State Human Rights Council for the State of São Paulo (CONDEPE) sent a delegation to monitor the case. In the early morning hours the next day, after an exhaustive negotiation, the alleged victim was examined by the Forensic Medicine Institute and held at the Military Hospital of Cambuci, in São Paulo. On June 5, 2008, however, a team made up of several members of the military entered the hospital room where the alleged victims were and subjected Mr. Araújo to a medical evaluation, under threat. Both were removed from the room and placed on a helicopter whose designation was the Air Base of São Paulo. After they were transported to Brasília Mr. Araújo was detained and taken to the General Hospital of Brasília.

9. The petitioner asserts that in the early morning hours of June 6, 2008, members of the Army took Mr. Araújo to the jail of the Police Battalion of the Army; while being transferred his head was covered with a plastic bag and he was assaulted with blows to the abdominal region and the feet. It argues that while detained he suffered sleep deprivation, he was deprived of access to medications prescribed for continuous use, and deprived of clothes suitable for the cold, in addition to the unnecessary use of shackles and intimate body searches. On June 8, 2008, Mr. Alcântara was interviewed on another nationally-broadcast television program and he denounced the torture being suffered by his partner. On June 11, 2008, a military police inquiry was opened to look into the allegations of torture, which considered that the accusations were not true; the complaint was archived on February 5, 2010. Consequently, the Office of the Military Prosecutor filed a complaint against the alleged victims for the crimes of slander, contempt, and offenses directed at the Armed Forces.

10. Mr. Araújo's defense counsel filed a writ of *habeas corpus*, which was granted on a preliminary basis on July 29, 2008, and ordered his provisional release. Finally, he was convicted of the crime of desertion by the Council of Justice on September 25, 2008, and sentenced to six months of detention. His defense counsel appealed on September 30, 2008, and the motion was partially granted on September 25, 2009, by the Superior Military Tribunal, which reduced the sentence to four months. On February 5, 2010, Mr. Araújo filed an extraordinary appeal (*Recurso Extraordinário*) for the case to be removed to the Federal Supreme Court; it was dismissed on March 5, 2010. Immediately the defense counsel filed a motion for reconsideration (*Agravo de Instrumento*) on March 26, 2010, also denied on May 26, 2010, and subsequently filed a special appeal (*Agravo Regimental*) on June 11, 2010, which was also denied on September 28, 2010. The ruling became *res judicata* on November 16, 2010.

Criminal proceedings against Messrs. Araújo and Alcântara

11. The petitioner alleges that Mr. Araújo was charged, on September 5, 2008, for the crimes of slander and contempt, and Mr. Alcântara for the crime of offense to the Armed Forces, in both cases because they allegedly invented the facts and publicized them in the media with the intent of harming the honor of officers and of the Army. In a judgment handed down June 8, 2010, the Council of Justice convicted Mr. Araújo and sentenced him to one year, three months, and five days of prison, with the right to remain free while appealing, conferring on him the benefit of conditional suspension of the sentence (probation) for two years. Mr. Alcântara was convicted and sentenced to eight months of detention, in the same conditions as his partner. The alleged victims filed an appeal on June 21, 2010, which was rejected by the Superior Military Tribunal on March 20, 2012.³

Threats against Mr. Alcântara and indictment for malicious prosecution

12. After identifying frauds in the management of the Health Fund of the Army and refusing to joining in the corruption scheme, Mr. Alcântara received death threats in anonymous phone calls on March 30, 2007; he immediately filed an incident report. The alleged victim forwarded a petition to the Army Command and the Office of the Military Prosecutor, which did not present an adequate response. The petitioner notes that these events unfolded simultaneously with the disciplinary proceedings faced by Mr. Araújo.

13. Petitioner argues that on July 27, 2007, a military police inquiry was opened at the request of the Office of the Military Prosecutor for the purposes of investigating possible psychological torture against the alleged victims due to the persecution, confirming Mr. Araújo's illness, investigating fraud in the tenders of the General Hospital of Brasília, and verifying the reasons that led to the decision to transfer the alleged victims. It asserts that said inquiry concluded that the complaints were unfounded. As a result, on October 8, 2010, the Federal Office of Public Prosecutor initiated a police inquiry into Mr. Alcântara – who at the time had already been discharged from the Army – for malicious prosecution because he provided cause for a proceeding against military authorities on the ground of lack of administrative probity. The complaint was filed by the federal police authority on January 27, 2011, and is said to continue to be under consideration.⁴

Request for discharge by Messrs. Araújo and Alcântara

14. The petitioner argues that given the facts, the alleged victims began their processes for leaving the Army. Mr. Alcântara's request for discharge was accepted within three days of being filed, on June 28, 2008. However, Mr. Araújo filed a request for leave from military service on October 8, 2008, which was not granted based on his conviction for the crime of desertion, whose penalty could not apply to a civilian. According to the petitioner, the alleged victim began a regular action for military retirement (*Ação Ordinária para Reforma Militar*) before the federal courts, requesting the lifting of Internal Bulletin No. 64, which was the basis for the desertion action, in light of his health.

The position of the State

15. The State argues that domestic remedies were not exhausted in some cases, and in others that the petition of the alleged victims is aimed at reviewing decisions adopted domestically. First, in relation to

³ According to information that is publicly accessible and a matter of public knowledge, one can verify that the defense counsel for the alleged victims filed a request for rehearing en banc (*Embargos Infringentes*) on June 4, 2012, which were denied and, on October 23, 2013, the matter became *res judicata*. On September 23, 2015, however, a writ of *habeas corpus* was filed with a motion for a preliminary injunction before the Federal Supreme Court, which was denied both on a preliminary basis and in the merits phase. That decision became *res judicata* on October 3, 2017.

⁴ According to the public information available, it is verified that on December 19, 2008, the federal courts found that they lacked jurisdiction to hear the matter and referred the matter to the Audit Office of the 11th Military Judicial District. That decision gave rise to a negative jurisdictional conflict; on August 26, 2009, the Superior Court of Justice decided that jurisdiction lay with the federal courts. The record does not indicate any subsequent procedural activity.

the persecution and psychological torture, it argues that the finding of military wrongdoings is based on the military's own rules, guaranteeing the accused the opportunity to defend themselves and to answer the charges against them. It also indicates that Mr. Araújo did not appeal the decision denying the special constitutional remedy (*mandado de segurança*), of July 4, 2007. As regards the alleged irregularities in the management of the Army Health Fund, it notes that in the sphere of the public civil action for lack of administrative probity (*Ação Civil Pública por Improbidade Administrativa*) that resulted from the complaint lodged by Mr. Alcântara, no irregularity was found, and the matter was archived on June 17, 2014.

16. As regards the regular action for military retirement, the State argues that on July 30, 2013, the federal courts ruled the action inadmissible without ruling on the merits since it had become moot, mindful that Mr. Araújo was able to have his removal granted administratively. It mentions that said decision was appealed and that on October 15, 2013, the federal judge did not receive it based on failure to make prepayment of costs when filing. Finally, it argues that the action would await the decision on the request for amendment of judgment filed by the alleged victim.

17. As regards the complaints for mistreatment – which includes persecution and psychological torture – the State argues that in the context of an investigation that lasted two years, no irregularity was found, and the military police inquiry was archived on February 5, 2010. As regards the criminal actions for the crimes of slander, contempt, and offense in relation to the Armed Forces, the alleged victims were convicted on appeal on March 20, 2012. Nonetheless, they were benefited by being able to serve the sentence under the open regime and, subsequently, by the prescription of the sentence.

18. The State indicates that Mr. Araújo had the right to all remedies available in the context of the proceeding for desertion, and that the matter became *res judicata* on November 16, 2011. It argues that subsequently the punishment was declared to have extinguished due to a Christmas pardon. It emphasizes that the alleged victims did not initiate a judicial action for civil reparations as a way to secure reparation for the harm suffered. Finally, the State highlights that the alleged victims had access to several remedies and that judicial guarantees were respected in all the proceedings pursued.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

19. This petition points to the existence of a possible context of discrimination on grounds of sexual orientation in the Brazilian Armed Forces. In that context, the alleged victims were said to have suffered discrimination and persecution because of their sexual orientation and the conjugal relationship that they maintain. The petitioner seeks to show that all the proceedings initiated against the alleged victims, both in the military justice system and in the federal courts, stemmed from that context. The various disciplinary proceedings brought against the alleged victim are said to have motivated, subsequently, a proceeding for desertion.

20. As regards said proceeding for desertion, the Commission considers that domestic remedies were exhausted on November 16, 2010, when the decision of the Federal Supreme Court that denied the special appeal (*Agravo Regimental*) became *res judicata*. The orders to transfer both alleged victims were the subject of a public civil action brought by the Public Ministry on September 18, 2007, whose anticipated protection was granted that same year, and the action was ruled out of order on the merits on February 7, 2011. Accordingly, the Commission verifies that in respect of both matter the six-month period provided for in Article 46(1)(b) of the American Convention is satisfied.

21. It also considers that the domestic remedies in the context of the criminal proceedings against the alleged victims were exhausted on March 20, 2012. In this regard, it recalls that the situation that should be taken into account for determining whether domestic remedies were exhausted is the situation

that existed upon deciding on the admissibility of the petition, since the filing of the complaint and the pronouncement on admissibility occur at distinct moments.⁵

22. Furthermore, as regards the allegations of torture suffered by Mr. Araújo, the Commission's analysis indicates that these were the subject of a military police inquiry begun in June 2008 and archived in February 2010. On that point, the exception to the exhaustion of domestic remedies set out at Article 46(2)(c) of the American Convention is considered to apply, mindful of the unwarranted delay on the part of the State, continuing to the present day, in providing a suitable remedy, i.e. an investigation at its own initiative, by the regular justice system, of the complaint of torture. Along the same lines, the Commission also understands that the same exception applies in relation to the criminal proceeding against Mr. Alcântara for malicious prosecution, begun in 2011, bearing in mind that there is still no decision, and no justification offered by the State in relation to the delay in the processing of that action.

VII. ANALYSIS OF COLORABLE CLAIM

23. Accordingly, bearing in mind the elements of fact and law set forth by the parties and the nature of the matter presented to it, the Commission considers that, if proven, the facts narrated tend to establish possible violations of Articles 5 (humane treatment), 7 (personal liberty), 8 (judicial guarantees), 11 (protection of honor and dignity), 13 (freedom of expression), 24 (equality before the law), and 25 (judicial protection), in relation to Articles 1(1) (obligation to respect the rights) and 2 (obligation to adopt provisions of domestic law) of the American Convention and also Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

VIII. DECISION

1. To find the instant petition admissible with respect to Articles 5, 7, 8, 11, 13, 24, and 25, all in relation to Articles 1(1) and 2 of the American Convention on Human Rights, as well as Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

2. To find the petition inadmissible in relation to Article 4 of the American Convention on Human Rights.

3. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 3rd day of the month of January, 2019. (Signed): Margarette May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, and Antonia Urrejola, Commissioners.

⁵ See, among others, IACHR, Report 4/15, Admissibility, Petition 582/01, Raúl Rolando Romero Feris, Argentina, January 29, 2015, para. 40.