

OEA/Ser.L/V/II.150
Doc. 35
July 25, 2014
Original: English

REPORT No. 70/14
PETITION 1453-06
REPORT ON ADMISSIBILITY

MAICON DE SOUZA SILVA, RENATO DA SILVA PAIXÃO ET AL.
BRAZIL

Approved by the Commission at its session No. 1995 held on April 25, 2014
151 Regular Period of Sessions

Cite as: IACHR, Report No. 70/14, Petition 1453-06. Admissibility. MAICON DE SOUZA SILVA,
RENATO DA SILVA PAIXÃO ET AL. BRAZIL , 7/25/14.



I. I. SUMMARY

1. On December 27, 2006, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the IACHR”) received a complaint lodged by the non-governmental organization *Projeto Legal* (“the petitioners”) against the Federative Republic of Brazil (“the State” or “Brazil”), in which the petitioner alleges violations of Articles 4, 5, 11 and 25 of the American Convention on Human Rights (“American Convention”), to the detriment of Maicon de Souza Silva and Renato da Silva Paixão (“the alleged victims”). The petitioners indicate that the petition is admissible since the alleged victims and their family members have been denied access to the remedies under domestic law.

2. According to the petitioners, on April 15, 1996, six officers from the 9th Battalion of the Rio de Janeiro Military Police conducted a raid at *Favela Amarelinho*, in the Irajá neighborhood of Rio de Janeiro, allegedly in order to arrest local criminals. The petitioners assert that, upon arriving at a narrow street (width of 2 meters), the police officers shot several times without verifying whether there were civilians in the area, specifically children between the ages of 2 and 6 who were playing in a nearby backyard. They further submit that the officers carelessly used their weapons, which included machine guns. As a result of the police raid, the petitioners allege that 2-year-old Maicon de Souza Silva was shot in the head and killed by a machine gunshot, while 6-year-old Renato da Silva Paixão was left injured with a gunshot to his face. The petitioners add that, since officers participating in the raid were from the Military Police, a military police inquiry (*Inquérito Policial Militar* – “IPM” n^o 214/96) was initiated before the 39th Police District, but this investigation was allegedly flawed in several ways, which led to it being archived in 2005. The petitioners thus argue that this petition is admissible, in conformity with Article 46.2.b of the American Convention.

3. The State contends that the petition is inadmissible because of the lack of exhaustion of domestic remedies, as required by Article 46.1.a of the American Convention. In this regard, the State points out that the investigation undertaken by the Military Police was archived on the basis of a judicial decision, but that this decision does not exhaust the remedies available under the internal legislation. In addition to that, the State argues that its authorities acted diligently to compensate Maicon de Souza Silva’s family members, who filed a civil claim for compensatory damages due to his death; and that the final judgment awarded them the equivalent of 500 minimum salaries. Also, the State indicates that Maicon de Souza Silva’s mother received R\$ 10,000 (ten thousand *reais*) from Rio de Janeiro state, as reparation under the provisions of State Decree n^o 27.862/2001. Finally, the State submits that the petition was filed extemporaneously, inasmuch as Article 46.1.b requires that petitions be filed within six months following the date of the notification of the final judgment; and also because, when exceptions to the requirement of prior exhaustion of domestic remedies are applicable, Article 32.2 of the IACHR’s Rules of Procedure establish that the petition shall be presented within a reasonable period of time. In this regard, the State concludes that the petition was neither presented six months after the final judgment nor within a reasonable period of time, since it was filed 10 years and 8 months after the facts took place on April 15, 1996. Based on all the foregoing, Brazil argues that the petition is inadmissible, by virtue of its failure to fulfill the requirements set out in Articles 46.1.a and 46.1.b of the American Convention, and Article 32.2 of the IACHR’s Rules of Procedure.

4. Without prejudging the merits of the claim, and in accordance with the provisions in Articles 46 and 47 of the American Convention, the Inter-American Commission decides to declare the petition admissible with respect to the alleged violation of Articles 4, 5, 8, 19 and 25 of the American Convention, in conjunction with the general obligations established by Articles 1.1 and 2 of the same instrument. On the other hand, the IACHR declares this petition inadmissible as regards the alleged violation of Article 11 of the American Convention. Lastly, the Inter-American Commission decides to notify this decision to the parties; publish the present report; and include it in its Annual Report to the General Assembly of the OAS.

II. II. PROCEEDINGS BEFORE THE IACHR

5. The Inter-American Commission received the petition on December 27, 2006. By notes dated June 13, 2007 and March 26, 2008, the IACHR requested additional information from the petitioners in order to have sufficient information to begin processing the petition. The petitioners sent additional information on July 31, 2007 and July 4, 2008.

6. Based on the information received, on April 13, 2011 the IACHR sent the relevant parts of the petition to the State. On July 13, 2011, Brazil submitted its initial response to the petition, which was duly transmitted to the petitioners on August 5, 2011. Since then, neither party has submitted any additional observations to the Inter-American Commission.

III. POSITION OF THE PARTIES

A. Position of the petitioners

7. As a matter of context, the petitioners assert that at least since the 1990s, Rio de Janeiro state authorities have been implementing inadequate public security policies that foster the disproportionate victimization of specific social and ethnic groups, particularly residents of *favelas*, where police officers come in shooting. The petitioners add that the police do not even verify whether there is any danger that might justify their excessive use of force, since they act under the presumption that every *favela* resident is a criminal suspect, thus an expendable target.

8. The petitioners allege that, on April 15, 1996, six officers from the 9th Battalion of the Rio de Janeiro Military Police conducted a raid at *Favela Amarelinho*, in the Irajá neighborhood of Rio de Janeiro, supposedly in order to arrest local criminals. The petitioners describe that, upon arriving at a narrow street (width of 2 meters), the police officers shot several times without verifying whether there were civilians in the area, specifically children between the ages of 2 and 6 who were playing in a nearby backyard. According to the petitioners, the officers even carelessly used machine guns. As a result of this police raid, the petitioners observe that 2-year-old Maicon de Souza Silva was shot in the head and killed by a shot from a machine gun, while 6-year-old Renato da Silva Paixão was left injured with a gunshot to his face.¹

9. The petitioners add that, since officers participating in the raid were from the Military Police, a military police inquiry (*Inquérito Policial Militar* - "IPM" nº 214/96) was initiated before the 39th Police District. The petitioners stress that this investigation was severely flawed, which led to it being archived in 2005, since the inquiry could not determine whether the stray bullet that fatally struck Maicon de Souza Silva was fired from the machine gun used by one of the military police participating in the raid. Therefore, the petitioners argue that this petition is admissible, in conformity with Article 46.2.b of the American Convention, since the alleged victims and their family members have been denied access to the remedies under domestic law. The petitioners also conclude that this petition is presented within a reasonable period of time, particularly in light of the duration and lack of efficacy of the investigation, in conformity with Article 32.2 of the Rules of Procedure of the Inter-American Commission.

10. Additionally, the petitioners observe that José Luiz Faria da Silva and Maria da Penha de Souza Silva, Maicon de Souza Silva's parents, filed a civil action for compensatory damages (*Ação Ordinária de Indenização* nº 5.997/96)² due to the death of their child at the hands of Rio de Janeiro state officials. According to the petitioners, the final judgment on this civil action awarded the parents the equivalent of 500 minimum salaries. However, as of 2008 they allegedly had not received the monetary compensation, because the plaintiff had not been able to pay the judicial costs (R\$ 394 - three hundred and ninety four *reais*). The petitioners add that the impunity observed in this case has caused a great impact, as well as anguish and psychological suffering to the next-of-kin of Maicon de Souza Silva. In this respect, the petitioners specifically allege that Ms. Silva has developed health problems as a consequence of the facts. Also, the petitioners allege that Mr. Silva's struggle for justice has caused conflicts within the family, both with Ms. Silva and with their oldest son, as well as threats and retaliation against him from military police officers. They allege that this denial of justice affects the situation of Renato da Silva Paixão and his family as well.

¹ Although it was not initially clear, the petitioners clarified in their communication of 7/31/2007 that Renato da Silva Paixão was to be included as an additional alleged victim in this petition; they ratified this in their communication of 7/4/2008.

² The petitioner indicates that this civil action was renumbered, on appeal, as nº 16695/98.

11. Based on the foregoing, the petitioners submit that the State is responsible for violations of Articles 4, 5, 11 and 25 of the American Convention.

B. Position of the State

12. Firstly, the State argues that this 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 the judicial decision to archive the military police inquiry has a *rebus sic stantibus* nature, thus it does not constitute *res judicata* nor does it imply exhaustion of domestic remedies, because, if the circumstances change and new evidence is presented to the authorities, the police investigation may be reopened at any time. Further, Brazil stresses that its authorities have acted diligently to compensate the family members of Maicon de Souza Silva. According to the State, his parents filed a civil claim for compensatory damages (*Ação Civil Ordinária* nº 5.997/96) due to his death, in which the final judgment awarded them the equivalent of 500 minimum salaries. Also, the State indicates that Maicon de Souza Silva's mother received R\$ 10,000 (ten thousand *reais*) from Rio de Janeiro state, as reparation under the provisions of State Decree nº 27.862/2001.

13. Additionally, the State alleges that the petition does not comply with the admissibility requirement set forth in Article 46.1.b, which requires that petitions be filed within six months following the date of the notification of the final judgment. In this regard, Brazil stresses that the petition was filed extemporaneously, because even if an exception to the requirement of prior exhaustion of domestic remedies were applicable, as the petitioner contends, Article 32.2 of the IACHR's Rules of Procedure establishes that the petition shall be presented within a reasonable period of time. The State notes that this petition was presented 10 years and 8 months after the facts took place on April 15, 1996. Therefore, the State argues that this amount of time cannot be deemed reasonable under the circumstances of this case.

14. In conclusion, the State contends that the present petition is inadmissible, by virtue of its failure to fulfill the requirements set out in Articles 46.1.a and 46.1.b of the American Convention, and Article 32.2 of the IACHR's Rules of Procedure.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

15. The petitioners have standing to file petitions with the Inter-American Commission pursuant to Article 44 of the American Convention. The petition indicates that the alleged victims are persons whose rights the State undertook to respect and ensure under the American 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 IACHR also has competence *ratione materiae* because the petitioners allege violations of rights protected by the American Convention. It also has competence *ratione temporis* because the obligation to respect and guarantee the rights protected by the American Convention was already in force at the time the facts allegedly occurred, starting on April 15, 1996. Finally, the Inter-American Commission also has competence *ratione loci*, because the alleged violations occurred within the territory of a State party to the American Convention.

B. Exhaustion of domestic remedies

17. Under Article 46.1.a 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 states 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. As to the question of exhaustion of domestic remedies, the IACHR preliminarily observes that, in cases of alleged homicide – which is a criminal offense prosecutable *sua sponte*– the proper remedy is normally a criminal investigation and prosecution before the ordinary judicial system. This principle would apply to the serious injuries allegedly sustained by Renato da Silva Paixão as well. It is an uncontested fact that in order to investigate the facts denounced herein, the State conducted a military police inquiry – IPM nº 214/96 (*supra* paras. 9 and 12). The IACHR has repeatedly asserted that, “in general, military judicial systems do not offer effective remedies to deal with violations of human rights.”³ Therefore, cases involving the military jurisdiction may well be subject to an exception to the requirement of prior exhaustion of domestic remedies. With specific regard to Brazil, in its decision on the admissibility of petition P-11.820 (*Eldorado dos Carajás*) in 2003, the IACHR concluded that it “does not consider the military police to have the independence and autonomy needed to impartially investigate alleged violations of human rights allegedly carried out by military police.”⁴ The IACHR has emphasized that even when a criminal process is underway before the ordinary jurisdiction, the mere investigation of violations of human rights by military justice entails problems:

[w]hen the military justice system conducts the investigation of a case, the possibility of an objective and independent investigation by judicial authorities which do not form part of the military hierarchy is precluded.⁵

19. Therefore, the IACHR determines, in line with its consistent doctrine, that although formally there does exist a remedy in Brazil for the investigation of human rights violations perpetrated by the Military Police, the conditions that apply render such investigations inadequate and, accordingly, a petitioner need not exhaust such a remedy.⁶ The Commission observes that there was also a civil action filed, which reportedly resulted in an order for compensation in favor of Maicon da Souza Silva’s family, although it is not clear if that has been executed. In any case, for the purposes of admissibility, the remedy normally considered as adequate is the criminal investigation and trial of those allegedly responsible; a civil action cannot provide an integral remedy. The Inter-American Commission thus concludes that this petition is admissible, because the domestic system of Brazil did not afford due process of law for the protection of the rights that have allegedly been violated, in accordance with the exception to the rule of prior exhaustion of domestic remedies set forth in Article 46.2.a of the American Convention.⁷

C. Timeliness of the petition

20. Article 46.1.b of the American Convention requires that petitions be lodged within a period of six months from the date on which the final judgment was notified. 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,

³ IACHR, Report No. 126/10, Admissibility, Petitions 1448-06, 1452-06, 1458-06 and 65-07, *Roberto Carlos Pereira de Souza et al.* (Brazil), October 23, 2010, para.47. See also IACHR, Report No. 39/10, Admissibility, Petition 150-06, *Nélio Nakamura Brandão and Alexandre Roberto Azevedo Seabra da Cruz* (Brazil), March 17, 2010, para.31.

⁴ IACHR, Report No. 4/03, Admissibility, Petition 11.820, *Eldorado dos Carajás* (Brazil), February 20, 2003, para. 27. See also IACHR, *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97, Doc. 29 rev. 1, Chapter III (September 29, 1997), paras. 77 and 95(i).

⁵ IACHR, Report No.4/03, Admissibility, Petition 11.820, *Eldorado dos Carajás* (Brazil), February 20, 2003, para. 28.

⁶ See, *inter alia*, IACHR, Report No. 126/10, Admissibility, Petitions 1448-06, 1452-06, 1458-06 and 65-07, *Roberto Carlos Pereira de Souza et al.* (Brazil), October 23, 2010, para.49; Report No. 39/10, Admissibility, Petition 150-06, *Nélio Nakamura Brandão and Alexandre Roberto Azevedo Seabra da Cruz* (Brazil), March 17, 2010, para. 34; Report No. 4/03, Admissibility, Petition 11.820, *Eldorado dos Carajás* (Brazil), February 20, 2003, para. 31; Report No. 23/02, Merits, Case 11.517, *Diniz Bento da Silva* (Brazil), February 28, 2002, para. 25; and Report No. 32/04, Merits, Case 11.556, *Corumbiara Massacre* (Brazil), March 11, 2004, paragraph 265.

⁷ See, *mutatis mutandi*, IACHR Report No. 96/09, Admissibility, Petition 4-04, *Antônio Pereira Tavares et al.* (Brazil), December 29, 2009, para. 35.

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.

21. Regarding the present claim, the IACHR already found *supra* that one of the exceptions to the rule on the exhaustion of domestic remedies was applicable to it, therefore it must be established whether the petition was filed within a reasonable time. In this regard, the Inter-American Commission notes that the police raid which allegedly resulted in the death of Maicon de Souza Silva and the injuries to Renato da Silva Paixão took place on April 15, 1996. The IACHR notes that the documents in the case file indicate that on May 30, 1998, the State of Rio de Janeiro was ordered to pay compensatory damages to Maicon's father. The decision was appealed and the second instance decision, issued on September 14, 1999, awarded the plaintiff the equivalent of 500 minimum salaries. Simultaneously, a military police inquiry (IPM n° 214/96) was instituted to investigate the criminal responsibility of the military police officers who participated in the raid, but it was eventually archived, reportedly in late in 2005.⁸

22. The petition was received by the Inter-American Commission on December 27, 2006. Under Article 32.2 of the IACHR's Rules of Procedure, and due to the particular circumstances of the present case,⁹ particularly the fact that the family members of the alleged victims were still seeking and expecting relief by means of the criminal investigation that was ongoing until 2005, the IACHR concludes that this petition was presented within a reasonable period of time.¹⁰

D. Duplication of proceedings and international *res judicata*

23. Nothing in the case file suggests that the petition lodged with the Inter-American Commission is currently pending settlement in another international proceeding or that it is substantially the same as another petition already examined by the IACHR or another international body, as stipulated in Articles 46.1.c and 47.d of the American Convention, respectively.

E. Colorable claim

24. 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.¹¹

25. 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 Inter-American Commission, based on the system's jurisprudence, to determine in its admissibility report which provisions of the relevant Inter-

⁸ Neither party has informed the IACHR of the precise date of the judicial decision which archived IPM n° 214/96, despite reiterated requests from the Inter-American Commission. The petitioner merely stated that "it has been archived since 2005," and the State did not contradict that information.

⁹ Other indicia in the case file confirm that the decision to archive was issued in 2005, possibly on November 11, 2005 (See, in this regard, news clips and, more specifically, *Consulta de Inquéritos / Notícias Crime 11/09/2006 16:30:59* – Attachments to the petition). The latter document is dated September 11, 2006 and would indicate that it was on that date that the petitioner took cognizance that the military police investigation had been archived.

¹⁰ See, *mutatis mutandi*, IACHR, Report No. 72/08, Admissibility, Petition 1342-04, *Márcio Lapoente da Silveira* (Brazil), October 16, 2008, para. 80.

¹¹ IACHR, Report No. 61/09, Petition 373-03, Admissibility, *Josenildo João de Freitas Jr. et al.* (Brazil), July 22, 2009, para. 36.

American instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements.

26. In this case, the Inter-American Commission observes that, if true, the petitioners' claims regarding the killing of 2-year-old Maicon de Souza Silva and the injuries to 6-year-old Renato da Silva Paixão allegedly caused by the Military Police of Rio de Janeiro could characterize a violation of Articles 4, 5 and 19 of the American Convention. In addition, if it is shown that the facts remain unpunished due to a lack of due diligence and impartiality in the investigation, as well as by the wide jurisdiction granted by Brazilian law to Military Courts when referring to investigations undertaken by the Military Police, and taking into account the alleged denial of justice to the next-of-kin of the alleged victims, the IACHR considers that the foregoing could tend to establish a violation of Articles 5, 8 and 25. The Commission considers all those provisions of the American Convention admissible in conjunction Articles 1.1 and 2 of the same instrument. On the other hand, the Commission considers that the petitioner has not presented basic elements to establish *prima facie* their claim concerning a potential violation of the right to honor and dignity, protected under Article 11 of the American Convention.

27. 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 *prima facie* the requirements set by Article 47.b. of the American Convention, with respect to Articles 4, 5, 8, 19 and 25, in connection with Articles 1 and 2. The Inter-American Commission rules that, in conformity with Article 47.b of the American Convention, these petitions are inadmissible as regards the alleged violation of Article 11 of the same instrument.

V. CONCLUSIONS

28. 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 declare this petition admissible in relation to the alleged violations of the rights protected in Articles 4, 5, 8, 19 and 25 of the American Convention, in conjunction with the general obligations enshrined in Articles 1.1 and 2 of that treaty;
2. To rule this petition inadmissible, with regard to the alleged violation of Article 11 of the American Convention;
3. To notify the State and the petitioner of this decision;
4. To publish this decision and include it in the Annual Report to be presented to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 25th day of the month of July, 2014. (Signed): Tracy Robinson, President; Rose-Marie Belle Antoine, First Vice President; Felipe González, Second Vice President; and Rosa María Ortiz, Commissioners.