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**REPORT No. 44/19**  
**PETITION 1185-08**  
REPORT ON ADMISSIBILITY

GERSON MENDONÇA DE FREITAS FILHO  
BRAZIL

Approved electronically by the Commission on April 24, 2019.

**Cite as:** IACHR, Report No. 44/19. Petition 1185-08. Admissibility. Gerson Mendonça de Freitas Filho. Brazil. April 24, 2019.



**I. INFORMATION ABOUT THE PETITION**

<b>Petitioners:</b>	Sonia Kodaira and Conectas Direitos Humanos
<b>Alleged victims:</b>	Gerson Mendonça de Freitas Filho
<b>State denounced:</b>	Brazil <sup>1</sup>
<b>Rights invoked:</b>	Articles 4 (life) and 25 (judicial protection), both in relation to Article 1.1 of the American Convention on Human Rights <sup>2</sup>

**II. PROCEEDINGS BEFORE THE IACHR <sup>3</sup>**

<b>Filing of the petition:</b>	October 8, 2008
<b>Notification of the petition to the State:</b>	April 23, 2013
<b>State's first response:</b>	July 1, 2013
<b>Further observations of the petitioners:</b>	August 26 and December 24, 2013
<b>Further observations of the State</b>	November 5, 2013 and February 28, 2014
<b>Notification on Potential Archiving:</b>	May 26, 2017; November 12, 2018
<b>Petitioner's response to notification on potential archiving:</b>	December 7, 2018

**III. COMPETENCE**

<b>Competence <i>Ratione Personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (ratified September 25, 1992)

**IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, NATURE, EXHAUSTION OF DOMESTIC REMEDIES, AND TIMELINESS**

<b>Duplication of procedures and international <i>res judicata</i>:</b>	No
<b>Rights declared admissible:</b>	Articles 4 (life), 8 (judicial safeguards), and 25 (judicial protection), all in relation to Articles 1.1 and 2 of the American Convention
<b>Exhaustion of domestic remedies or applicability of an exception:</b>	Yes
<b>Timeliness:</b>	Yes

**V. ALLEGED FACTS**

1. Sonia Kodaira (hereinafter, “Ms. Kodaira”) and the organization Conectas Direitos Humanos (Portuguese: Human Rights Connection; hereinafter, “Conectas”), both plaintiffs, state that Gerson Mendonça de Freitas Filho (hereinafter, “Mr. Freitas” or “alleged victim”) was killed<sup>4</sup> in the course of the use of deadly force as part of a police operation seeking to deter two men who had taken him hostage. They claim that a lack of effective recourse to hold government agents to account for such a crime creates a systemic and structural environment of impunity.

<sup>1</sup> In accordance with Article 17.2.a of the Commission Regulations, Commissioner Flávia Piovesan, a Brazilian national, did not take part in either the debate or the ruling on the present matter.

<sup>2</sup> Hereinafter, “American Convention” or “Convention.”

<sup>3</sup> Both parties’ statements were duly conveyed to the opposing party.

<sup>4</sup> Translator’s Note: The Portuguese *assassinado* would normally be rendered as “murdered” in English. However, the facts described in the remainder of this document do not point to any premeditation on the part of the accused. Rather, it is a case more akin to what in English would be termed “manslaughter” or “wrongful death”: one resulting from recklessness rather than malicious intent.

2. The plaintiffs state that on March 17, 2006, Mr. Freitas was the victim of a kidnapping, the goal of which was to make cash withdrawals from automatic teller machines (a form of kidnapping known in Brazil as “lightning kidnapping”) in the South Zone of the city of São Paulo. They claim that someone told the police and that, after a chase which lasted approximately half an hour, the car carrying the alleged victim and the two kidnappers was surrounded by 4 squad cars and 10 armed police officers.<sup>5</sup> They state that in a shootout that ensued between the kidnappers and the police, Mr. Freitas was killed while lying down restrained in the back seat of the vehicle. The plaintiffs claim that the officers fired approximately 35 shots, 17 of which hit the car in which the alleged victim was being held. The shot which hit the alleged victim was fired by Officer Haroldo Amando Agra. Afterward, forensics evidence confirmed that the shots which hit the car were fired by the police and not by the kidnappers.

3. On April 28, 2006, the Office of the Public Prosecutor filed charges and opened a criminal investigation into the deaths of the alleged victim and of one of the kidnappers, in addition to bringing a charge of kidnapping against the other. They point out that the criminal case followed its regular course and that several experts concluded that the police had acted disproportionately, citing as evidence the excessive and abusive use of deadly force during the standoff. In the face of this, the Office of the Public Prosecutor (hereinafter, MP, according to its Portuguese acronym) requested that the police officers face a jury trial. However, on April 25, 2007, the accused, including the police officer who fired the shot, were acquitted on the grounds of two legal exemptions extending immunity as provided for in the Penal Code:<sup>6</sup> acting in self-defense, and in strict compliance with lawful duties. The MP filed a motion for appeal *in sensu stricto* on July 10, 2007, seeking to remove the immunity and prove the punishable excessive use of force based on the facts of the case. The motion for appeal was denied on April 10, 2008. To the plaintiffs, the outcome in the criminal case represents a classic example of cronyism between the judicial branch and the police in Brazil in cases concerning the use of excessive deadly force.

4. On the administrative side of things, they stated that on the day after the events took place, a police probe was launched by virtue of the depositions taken from all of the police officers involved, as well as from witnesses. The report published on May 16, 2006 also did not identify any transgressions on the part of the police officers. The police colonel commander for the metropolitan area of São Paulo accepted the report on May 29, 2006 and remitted the findings to a military tribunal within the judicial branch, which declined to hear the case on the grounds that the subject matter properly fell within the jurisdiction of the civilian courts.<sup>7</sup> Lastly, they state that no decision has been rendered and no punishment has been assigned in the administrative sphere, thereby reinforcing the sense of impunity for the person responsible for the death of the alleged victim.

5. The government, on the other hand, argues that on the day of the events in question, the competent authorities took depositions from all of the police officers involved and from the bystanders who witnessed the incident. It argues that on March 18, 2006, the police probe was launched and the investigation concluded that there was insufficient evidence of wrongdoing on which to base any disciplinary actions whatsoever to be taken against the officers. It argues that, furthermore, back in 2006, a criminal case was opened with the aim of getting justice for the kidnapping and for the deaths of the alleged victim and kidnapper. Following the regular course of action and the exhaustive analysis of forensic experts and other evidence, the government maintains that the judge ruled in favor for Haroldo Amando Agra, as well as for the other police officers involved in the incident, on the understanding that they had acted in strict

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<sup>5</sup> Translator’s Note: The original Portuguese *policiais militares* should not be misconstrued as “military police” in English, which are known in Portuguese as *policia do exército* (literally, “army police” or “armed forces police”). In Brazil, the term *policia militar* is used as a designation for the corps of armed officers patrolling the streets as cops on the beat, as distinct from the *policia civil*, who are responsible for the more administrative and investigative functions of police work, such as that of detectives. Since these other forms of police are not referenced in this document, *policia militar* will hereinafter be rendered “police officers,” or simply, “police.”

<sup>6</sup> Penal Code. Art. 23 – It shall not be a crime when an officer is faced with any of the following situations: I – in a state of necessity; II – acting in self-defense; III – in strict compliance with legal duties or in the carrying out of regular lawful duties. Sole paragraph – The officer, even under any of the circumstances described in this article, shall remain answerable for excessive force or willful wrongdoing.

<sup>7</sup> Federal Law No. 9.299/96 specifies that civilian courts have jurisdiction to hear cases in which violent crimes are committed by armed service members against civilians.

compliance with their legal duties and in self-defense. Following a motion for an appeal entered by the MP, the ruling was upheld by the appeals court on April 10, 2008.

## VI. ANALYSIS OF EXHAUSTION OF INTERNAL RECOURSES AND TIMELINESS OF THE PETITION

6. With respect to the exhaustion of internal recourses, the plaintiffs claim that the final decision in the case, rendered on April 10, 2008, left them with no further alternative venue in which to retry it on its merits. Nevertheless, they stress that the climate of impunity surrounding police conduct in Brazil cannot be ignored, and for this reason, there is no such thing as an impartial judgment coming out of the judicial branch in cases like that involving the alleged victim. Furthermore, they argue that whatever disciplinary actions might or might not be imposed on the judges if the case were to be brought before the National Justice Council would still be inadequate to make them whole in the face of such violations of the American Convention.

7. The government, nevertheless, maintains that internal recourses were not exhausted and that the supposed impartiality of members of the judicial branch was not called into question by means of any internal procedure. It states that the plaintiffs could have gone to the National Justice Council regarding the possibility of opening an administrative disciplinary process (PAD, according to its Portuguese acronym), but they did not do so. Furthermore, it argues that the requests filed by the plaintiffs before the Inter-American Commission were not filed internally as they could have been, for example, in the case of a claim for compensation to correct for alleged hedonic damages for pain and suffering and mental anguish suffered by Ms. Kodaira, the alleged victim's partner.

8. The rule on exhaustion of internal recourses provided for in Article 46.1.a of the American Convention establishes that recourse should first be made to the normally available and proper internal channels of the judicial system. Such recourses should be sufficiently secure, both formally and materially – that is, they should be accessible and efficient for resolving the matter under dispute. On this point, the Commission has already established that the exhaustion of internal recourses need not mean that the alleged victims be necessarily required to exhaust all recourses which may be available to them. As such, if the alleged victim brought the case through means of one of the valid and appropriate venues under domestic law and the government had the opportunity to remedy the matter under its jurisdiction, the requirement under international law has been satisfied.<sup>8</sup>

9. Based on this understanding, the Commission finds that the criminal case brought against the police officers involved in the incident should be considered and adequate pursuit of recourse and that such recourse was, therefore, duly exhausted internally. It stresses that, by agreeing to hear the present petition, this should not be construed as calling into question the jurisdictional competence of the domestic judicial authorities. Its aim is, rather, to analyze the merits of the case to see whether the internal judicial processes complied with the guarantees of due process and judicial protection, as well as offering due guarantees of access to justice for the alleged victim under the terms of the American Convention.

10. As far as the need to file suits and complaints with non-judicial institutions such as, for example, the National Council of Justice, it finds that these initiatives do not constitute adequate recourses in the face of the human rights violations being claimed<sup>9</sup> and need not, therefore, be exhausted. Lastly, with regard to the need to bring a civil suit for damages domestically, the Commission finds that in cases of grave violations of human rights, the alleged victims need not seek redress in civil court for damages before applying to the Inter-American system, bearing in mind that this type of remedy does not relate to the initial request presented in the petition.<sup>10</sup> That is, a civil action would not redress the alleged impunity of police

<sup>8</sup> IACHR, Report No. 16/18. Standing. Petition 884-07, Victoria Piedad Palacios Tejada de Saavedra. Peru. February 24, 2018, para. 12.

<sup>9</sup> See, *mutatis mutandis*, IACHR, Report No. 36/05 Lack of Standing. Petition 12.170, Fernando A. Colmenares Castillo, Mexico, March 9, 2005, para. 38-39.

<sup>10</sup> IACHR, Report No. 105/17. Petition 798-07. Standing. David Valderrama Opazo et al. Chile. September 7, 2017, para. 11; IACHR, Report No. 78/16. Petition 1170-09. Standing. Amir Muniz da Silva. Brazil. December 30, 2016, para. 32.

officers in this case and, beyond the case itself, the structural and systemic impunity surrounding the use of excessive deadly force on the part of security forces in Brazil.<sup>11</sup>

11. Given all of the foregoing, the Commission finds that the present petition meets the requirements outlined in Article 46.1 of the American Convention, keeping in mind that internal recourses were exhausted with the ruling of April 10, 2008 and that the petition was filed by the plaintiff within the six-month timeframe.

#### **VII. ANALYSIS OF COLORABLE CLAIM**

12. Keeping in mind the questions of fact and of law laid out by the parties and the nature of the matter in question, the Commission finds that, if proven, the facts described could constitute possible violations of Articles 4 (life), 8 (judicial safeguards), and 25 (judicial protection), all in relation to Article 1.1 (obligation to honor rights) and 2 (duty to take internal measures to protect rights) of the American Convention.

#### **VIII. DECISION**

1. To declare this petition admissible with respect to Articles 4, 8, and 25, all with respect to Articles 1.1 and 2 of the of the American Convention; and

2. To notify the parties of this decision; to continue to examine the merits of the matter, 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 24th day of the month of April, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarette May Macaulay, Francisco José Eguiguren Praeli and Luis Ernesto Vargas Silva, Commissioners.

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<sup>11</sup> IACHR, Press release. UN Human Rights and IACHR condemn use of excessive force during demonstrations and during security operations in Brazil, May 26, 2017.