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REPORT No. 128/19

PETITION 1174-09

REPORT ON ADMISSIBILITY

JOSÉ RAFAEL BREZER ET AL.

BRAZIL

Approved electronically by the Commission on August 16, 2019.

Cite as: IACHR, Report No. 128/19, Petition 1174-09. Admissibility. José Rafael Brezer et al. Brazil. August 16, 2019.



I. INFORMATION ABOUT THE PETITION

Petitioner	Inter-American Foundation for the Defense of Human Rights (FidDH: Fundação Interamericana de Defesa dos Direitos Humanos) and the Association of Christians for the Abolition of Torture (ACAT)
Alleged victim	José Brezer et al. ¹
Respondent State	Brazil ²
Rights invoked	Articles 5 (humane treatment), 7 (personal liberty), 8 (judicial guarantees), 19 (rights of the child), 24 (equality before the law), and 25 (judicial protection), all in conjunction with Articles 1(1) (obligation to respect the rights) and 2 (obligation to adopt domestic law provisions) of the American Convention on Human Rights ³ ; and Articles 1, 6, 7, 8, and 9 of the Inter-American Convention to Prevent and Punish Torture

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition	September 17, 2009
Notification of the petition	July 2, 2014
State's first response	October 3, 2014
Additional observations from the petitioner	May 8, 2015
Additional observations from the State	September 9, 2015
Notification of the possible archiving of the petition	September 21, 2018
Response to the notification regarding the possible archiving of the petition	November 5, 2018

III. COMPETENCE

<i>Ratione personae</i>	Yes
<i>Ratione loci</i>	Yes
<i>Ratione temporis</i>	Yes
<i>Ratione materiae</i>	Yes. American Convention (instrument adopted September 25, 1992) and Inter-American Convention to Prevent and Punish Torture (instrument deposited 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), 19 (rights of the child), 22 (movement and residence), 24 (equality before the law), and 25 (judicial protection), all in conjunction with Articles 1(1) (obligation to respect the rights) and 2 (obligation to adopt provisions of domestic law) of the American Convention, and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture

¹ The other alleged victims are Maria Aparecida Uterkircher Brezer (mother), Benedito Ferreira Brezer (father), and Deusa Aparecida Leme (witness).

² 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 the instant matter.

³ Hereinafter "American Convention."

⁴ The observations submitted by each party were duly transmitted to the opposing party.

Exhaustion or exception to the exhaustion of remedies	Yes
Timeliness of the petition	Yes, March 18, 2009

V. SUMMARY OF ALLEGED FACTS

1. The petitioner alleges that the adolescent José Rafael Brezer (hereinafter “alleged victim”), 15 years old at the time of the facts, was falsely accused, kidnapped, and tortured by private persons and state security agents of the state of São Paulo. All of those involved in the facts were said to have been acquitted in allegedly partial proceedings that resulted in impunity and grave sequelae for the alleged victim and his family.

2. The petitioners state that on July 12, 1997, the alleged victim was falsely accused of receiving as stolen goods jewels from the family of attorney José Rubens do Amaral Lincoln (hereinafter “Mr. Lincoln”). Because of that accusation, José Rafael Brezer was kidnapped, arbitrarily held prisoner in a country house, shackled, threatened with death with a firearm, and physical assaulted by Mr. Lincoln, police investigator Maria da Graça Lincoln Rezende (Mr. Lincoln’s sister), and police investigator Oséias Rosa. They note that the detention was carried out without a judicial order and that the objective was to locate the jewels sold to the alleged victim by José Rubens do Amaral Lincoln’s son. According to the petitioners, the group used a car owned by Mr. Lincoln, without any license plate, to commit the crimes. After approximately one hour the alleged victim was taken to the police station after Mr. Lincoln communicated by telephone with the officer in charge, José Rubens Carneiro. The officer gave guidance to the parents of each adolescent to the effect that they should resolve the matter domestically, which was accepted by both families, without incident to date. The petitioners argue that the alleged victim did not report the facts at the time because of fear of reprisals.

3. On coming to learn all the details, the alleged victim’s mother, Maria Aparecida Uterkircher Brezer (hereinafter “Ms. Brezer”), lodged a complaint with the police, accompanied by an eyewitness, Deusa Aparecida Leme. Yet they allege that despite indicating the names of all those involved, the police officer who took the incident report included only the first names of the persons denounced in the document. That information was confirmed by the Office of the Attorney General, which also found that the police officer vouched for the conduct of Mr. Lincoln and the police investigators. It was only on July 15, 1997, that Mr. Lincoln reported the occurrence involving the jewels, and that day the alleged victim underwent an expert medical exam that found several lesions and handcuff marks on his wrists.

4. On July 17, 1997, the facts were related to the Office of the Attorney General, which asked that a police inquiry be opened, which concluded on June 18, 1998. On July 17, 1998, the Office of the Attorney General filed charges against Mr. Lincoln and the police investigators under the Brazilian Anti-Torture Law (Law No. 9,455/97). Also charged, under that same law, was the officer in charge the day of the facts for omission in failing to combat and effectively investigate torture. They alleged that the criminal action went forward only in relation to the first two, for as regards the officer it was archived based on the allegation of lack of just cause. In the judgment handed down on September 1, 2000, the accused were acquitted at trial as the judge understood that the accusations were driven by political considerations, and that there was not sufficient evidence to find that the crime took place. The Office of the Attorney General appealed the judgment, and in 2006 the appeal was rejected by the Court of Appeals (*Tribunal de Justiça*) of the state of São Paulo (hereinafter “TJSP”), as it understood that the constituent elements of the crime of torture were not present. The alleged victim, as private prosecutor, filed requests for amendment of judgment (*Embargos de Declaração*) on April 5, 2006, which were rejected on August 3, 2006. On September 15, 2006, the defense filed an Extraordinary Appeal (*Recurso Extraordinário*) and a Special Appeal (*Recurso Especial*), which were denied by the TJSP, as it understood that what was sought was merely a reexamination of the evidence. Against that decision interlocutory appeals (*Agravos de Instrumento*) were filed before the higher courts. The Federal Supreme Court (*Supremo Tribunal Federal*) dismissed that appeal on March 17, 2008; that judgment became *res judicata* on April 28, 2008. The Court of Appeals (*Superior Tribunal de Justiça*) had dismissed it on February 18, 2009; that judgment became *res judicata* on March 18, 2009.

5. Mr. Lincoln was subject to a disciplinary proceeding before the Ethics and Disciplinary Tribunal of the Ordem dos Advogados do Brasil (the Brazilian bar association), São Paulo Section (hereinafter “OAB/SP”), by a petition filed by Ms. Brezer. In August 2004, the Ethics and Disciplinary Tribunal decided not to hold him liable; that decision was affirmed on appeal. When the matter was further appealed, the Federal Council of the OAB annulled the proceeding on procedural grounds and the OAB/SP appealed on January 30, 2008. The petitioners do not report on the result of that proceeding. Similarly, the police investigators and police officer faced an administrative proceeding instituted by the Civilian Police of the State of São Paulo. In a decision of April 19, 2000, the Council of the Civilian Police did not identify irregularities in the action of the agents involved. On May 8 2000, the record was sent to the Secretary for Public Security of São Paulo.

6. After filing the complaint, the alleged victim and his family suffered threats and were forced to leave the city where they lived in February 2000, and move to a rural area. In addition, they indicate that the authorities who took measures to continue the investigations and the criminal action were transferred from the city. As a result of the threats and the impunity, they affirm that the whole family was weakened and suffered impacts on their lives. In addition, they alleged that witness Deusa Aparecida Leme was threatened during the course of the criminal action to get her not to tell the truth. The threat was said to have been from two persons, one of them a municipal guard. Based on the petition, a criminal action was begun to verify the coercion suffered, resulting in acquittal by a judgment handed down on November 13, 2000, which was affirmed on appeal by decision of the TJSP in 2005.

7. In terms of context, the petitioners argue that the clear inequality in economic capacity and power between the parties, as well as discriminatory sociocultural patterns, had a negative impact on how the legal institutions acted, especially in the criminal and disciplinary proceedings brought against the accused. Finally, they argue that the State failed to provide free legal assistance to the alleged victims, highlighting the absence of the Office of Public Defender in the city of Tatuí, where the facts unfolded, situated 131 kilometers from the state capital.

8. The State, by way of contrast, argues that the authorities acted diligently in conducting the proceedings and that all levels of appeal could be accessed by the alleged victims. As regards the action of the alleged victim as a private accuser, it says that it never considered having him bear the responsibility for bringing the criminal action. The existence of this procedural device enables the Office of the Public Defender to act and, in its absence, the State should provide legal alternatives for those states (of Brazil) that have not established public defenders’ offices, such as designating *ad hoc* attorneys. It alleges, however, that there was no prejudice in the course of the proceedings based on any discrimination, and that making that argument to the Commission would violate the sovereignty of the State.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

9. The petitioners argue that domestic remedies were exhausted on March 18, 2009, with the decision of the Court of Appeals that refused to grant the interlocutory appeal, i.e. 12 years after the facts. They note, however, that the crime of torture is the subject of an unconditional criminal action, i.e. it must be filed and pursued by the Office of the Attorney General. Nonetheless, in the instant case the Office of the Attorney General failed to file appeals after the decision in the second instance, shifting that responsibility to the alleged victim. They also allege that even if domestic remedies were not exhausted, the exception at Article 46(2)(c) of the Convention could be applied in view of the unwarranted delay. Finally, they argue that one could also apply the exception at Article 46(2)(b) of the Convention, mindful that free judicial assistance was not guaranteed for the alleged victims.

10. The State, in turn, argues that domestic remedies were not exhausted, considering that the decision handed down on February 18, 2009 is a monocratic decision, and that one could have brought a regulatory appeal (Agravo Regimental) before the plenary of the court within five days, and that this was not done by the defense counsel for José Rafael Brazer. In addition, it notes that domestic remedies were not exhausted in relation to the criminal action for coercion of witness Deusa Aparecida Leme, since appeals could have been brought before the higher courts. Finally, the State argues that the alleged victims did not bring a civil action for compensation, and that in this regard they also failed to exhaust domestic remedies.

11. The Commission understands that in cases that involve possible violations of human rights prosecutable *sua sponte* by the Office of the Attorney General – especially when state agents are involved in the facts – the State has an obligation to investigate diligently. That burden must be assumed by the State as its own legal duty, and not as a mere arbiter of private interests, nor should it depend on the initiative of or production of evidence by the alleged victims.⁵ In the instant case, the Commission considers that the alleged victim pursued and exhausted all remedies available to hold the accused liable. Moreover, on the need to exhaust domestic remedies in relation to civil reparations for serious human rights violations such as unlawful arrest and torture, the alleged victims do not need to turn to the civil sphere in search of reparation before accessing the inter-American system, bearing in mind that such a remedy would not respond to the principal relief sought in the petition.⁶

12. In view of the foregoing, the Commission considers that domestic remedies were duly exhausted by the alleged victim with the decision of the Court of Appeals, which became *res judicata* on March 18, 2009, and that all the other requirements of Article 46(1) of the American Convention were also satisfied. As regards the criminal proceeding for coercion in relation to alleged victim Deusa Aparecida Leme, however, the Commission observes that the six-month period was not observed by the petitioners, since the last decision in that proceeding was in 2005.

VII. COLORABLE CLAIM

13. In view of the factual and legal elements presented by the parties and the nature of the matter brought to its attention, 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), 19 (rights of the child), 22 (movement and residence), 24 (equality before the law), and 25 (judicial protection), all in relation to Articles 1(1) (obligation to respect rights) and 2 (obligation to adopt provisions of domestic law) of the American Convention; and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, due to the alleged lack of investigation.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 7, 8, 19, 22, 24, and 25 of the American Convention in relation to its Articles 1(1) and 2; and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

2. 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 16th day of the month of August, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández, First Vice President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Francisco José Eguiguren, and Luis Ernesto Vargas Silva.

⁵ IACHR. Report No. 159/17. Admissibility. Sebastián Larroza Velásquez and family. Paraguay. November 30, 2017, para. 14.

⁶ IACHR. Report No. 105/17. Petition 798-07. Admissibility. David Valderrama Opazo et al. Chile. September 7, 2017, para. 11; IACHR, Report No. 78/16. Petition 1170-09. Admissibility. Amir Muniz da Silva. Brazil. December 30, 2016, para. 32.