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**REPORT No. 227/19**

**PETITION 1500-12**

REPORT ON ADMISSIBILITY

CHARLES EDUARDO MACEDO

BRAZIL

Approved electronically by the Commission on December 31, 2019.

**Cite as:** IACHR, Report No. 227/19, Petition 1500-12. Admissibility. Charles Eduardo Macedo. Brazil. December 31, 2019.



**I. INFORMATION ABOUT THE PETITION**

Petitioner:	Specialized Center for Citizenship and Human Rights of the Public Defender's Office of the State of São Paulo [ <i>Núcleo Especializado de Cidadania e Direitos Humanos da Defensoria Pública do Estado de São Paulo</i> ] (NECDH)
Alleged victim:	Charles Eduardo Macedo
Respondent State:	Brazil <sup>1</sup>
Rights invoked:	Articles 7.2 (personal liberty), 10 (right to compensation), 13 (freedom of expression) and 25.1 (judicial protection) of the American Convention on Human Rights, in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof <sup>2</sup>

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

Filing of the petition:	August 16, 2012
Notification of the petition to the State:	November 24, 2015
State's first response:	February 16, 2016
Additional observations from the petitioner:	June 23, 2017
Additional observations from the State:	March 6, 2018

**III. COMPETENCE**

Competence Ratione personae:	Yes
Competence Ratione loci:	Yes
Competence Ratione temporis:	Yes
Competence Ratione materiae:	Yes, American Convention (instrument deposited on September 25, 1992)

**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 7.2 (personal liberty), 13 (freedom of expression) and 25.1 (judicial protection) of the American Convention, in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, June 25, 2012
Timeliness of the petition:	Yes, August 16, 2012

**V. FACTS ALLEGED**

1. The petitioner alleges that Charles Eduardo Macedo was convicted on October 20, 2011 in a criminal trial before the 3rd Criminal Court of the district of São José do Rio Preto, São Paulo, for the offenses

<sup>1</sup> In accordance with Article 17.2.a of the Commission's Rules of Procedure, Commissioner Flávia Piovesan, a Brazilian national, did not participate in the discussion or decision of this matter.

<sup>2</sup> Hereinafter, "ACHR" or "American Convention."

<sup>3</sup> The observations submitted by each party were duly transmitted to the opposing party.

of drug possession for personal use<sup>4</sup> (art. 28 of Federal Law No. 11.343/06<sup>5</sup>) and criminal defamation [*desacato*], the latter being the subject of this petition (art. 331 of the Criminal Code). Article 331 reads: “insulting a public servant in the performance of his or her duties or on account of such duties: Penalty - detention, from 6 (six) months to 2 (two) years, or a fine.”<sup>6</sup> According to the petitioner, the Public Prosecutor’s Office alleged that while being taken to the police station for having been found to be in possession of a narcotic substance, the alleged victim insulted a public official in the performance of his duties, by telling the military police officer “*You shameless, corrupt, thieving, lazy cop, I won’t be locked up forever, you’re gonna be fucked, you’re gonna die.*”

2. A review of the file shows that the alleged victim’s defense counsel asserted in the criminal proceedings that Article 331 of the Criminal Code has been repealed by Article 13 of the ACHR. The defense further argued, based on the doctrine of “conventionality control” under said treaty, that Article 331 could not be applied, and Macedo therefore had to be acquitted. Notwithstanding this argument, the trial judge sentenced him to one year of open prison detention for the offense of criminal defamation and to 8 months of community service for drug possession. In his decision, the judge held, *inter alia*, that “although the criminal offense established in art. 331 is incompatible with the aforementioned Convention, this in itself does not have the effect of revoking that provision of art. 331 of the Criminal Code.” The petitioner filed an appeal with the Court of Appeals [*Turma Recursal*], which upheld the trial court’s decision with respect to the criminal defamation offense, reducing the custodial sentence to 7 months, with open detention and conditionally suspending the execution of the sentence. The Court held that the right guaranteed by Article 13 of the American Convention “does not authorize the use of offensive, insulting, and humiliating speech against a public servant; therefore, there is no basis to repeal the offense of criminal defamation.” The petitioner contends that with this decision, entered on August 25, 2012, the alleged victim exhausted the domestic remedies with regard to the offense of criminal defamation, when affirming that “[t]he two state instances to try to guarantee the validity of article 13 of the [ACHR], which prevails over article 331 of the Brazilian Criminal Code” were exhausted.

3. Finally, the petitioner alleges that the final decision ordering Macedo to serve a sentence for the offense of criminal defamation, and the very classification of defamation as a crime under Brazilian law, violate the right to freedom of expression set forth in Article 13 of the ACHR. It also claims that his personal liberty was “unduly restricted [*tolhida*]” on account of a conviction for the commission of a crime incompatible with the ACHR; therefore, his right under Article 7.2 of the ACHR was violated. It further states that, in the Brazilian system, sentences resulting from criminal convictions are served in a unified manner, so that the sentences for all convictions are added together for all legal purposes, including for determining the regime under which the sentence is served. It reports that Macedo was convicted in three separate trials, and that the sentencing judge consolidated the sentences and ordered that all of them be served under a closed prison regime. Therefore, the petitioner maintains that the conviction for criminal defamation was included in the consolidated calculation of sentences and effectively led to his detention at the Pacaembu State Penitentiary in São Paulo. It argues, *inter alia*, that the criminal defamation conviction “caused [the alleged victim] unequivocal pain and suffering, as a result of being tried and convicted for a crime that [...] violates his human rights.” It also maintains that the State, by failing to apply the American Convention and guarantee his acquittal with respect to the criminal defamation offense, committed a judicial error. Therefore, it submits that Macedo should be compensated in accordance with Article 10 of the ACHR.

4. For its part, the State argues that the alleged victim did not exhaust the effective domestic remedies that were appropriate to the circumstances of the specific case. It further contends that the petition does not allege facts that amount to violations of the ACHR, but merely establishes an inconsistency between the Penal Code and the American Convention. On this point, it argues that the petitioner’s complaint is not based on an unjust conviction or judicial error, but rather that it seeks to challenge criminal defamation, an offense under Brazilian law that must be enforced by judges as such.

<sup>4</sup> According to the information available in the criminal case record attached to the file, 5,800g of marijuana had been found on the alleged victim’s person.

<sup>5</sup> Presidency of the Republic of Brazil. Law No. 11.343. August 23, 2006.

<sup>6</sup> Presidency of the Republic of Brazil. Decree-Law No. 2.848. Criminal Code. December 7, 1940.

5. The Brazilian State also maintains that, at the time the petition was filed, there was no restriction on the alleged victim's personal liberty for the offense of criminal defamation, and that the existence of this offense is not a relevant factor in the deprivation of his liberty. It indicates that Macedo's sentence for the offense of criminal defamation was 7 months, under an open regime and with the benefit of the conditional suspension of the sentence, and therefore this sentence was not the reason for his imprisonment; rather, he was imprisoned due to the other convictions against him for the commission of "several other crimes." The State thus asserts that the judgment, which was rendered in absolute conformity with due process guarantees, did not in itself infringe upon his personal liberty, and that the petition does not describe a situation that violates Article 7 of the ACHR. With respect to the restriction to freedom of expression contained in Article 331 of the Criminal Code, the State is of the opinion that it is "fully reasonable, based on a deeper examination of the content of the speech that Article 13 of the ACHR is intended to protect and of the speech that Article 331 of the Brazilian Criminal Code is intended to penalize." According to the State, Article 331 of the Criminal Code protects values equally protected by the ACHR, such as public morals, and "it is a restriction provided for by law, applicable as a form of reparation and subsequent liability and not as censorship."

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

6. The petitioner alleges that available domestic remedies were exhausted on August 25, 2012, with the decision of the Court of Appeals. It affirms that, with that decision, the domestic remedies were exhausted with regard to the offense of criminal defamation, indicating that under the domestic law this Court is the final instance for lower-level criminal offenses such as criminal defamation. Regarding the appeals filed by the State, it indicates that the Federal Supreme Court (STF) has already established that habeas corpus is inadmissible when there is a final and unappealable judgment. In relation to the extraordinary appeal, it maintains that such appeals are only admissible on certain pre-established grounds set forth in the Constitution, which would not include the present case. In addition, it argues that this remedy is not in practice an effective remedy for the violation since the STF has already repeatedly held that it cannot be used to determine the incompatibility of Article 331 of the Criminal Code and Article 13 of the ACHR. It also states that the refusal of the STF to judge art. 331 of the Criminal Code incompatible with the ACHR, "[i]t's, by itself, a violation of article 25 (1) of the treaty, and, therefore, the petitioner should not be required to seek, in that Court, protection against the violation to which he was subjected."

7. Finally, regarding the criminal review action, it argues that this appeal may only be filed in the cases provided for in Article 621 of the Code of Criminal Procedure,<sup>7</sup> mainly to correct clear errors with regard to the evidence or in the event that new evidence emerges, but not to review the merits of the conviction or to re-examine the matter. Moreover, the petition indicates that it neither has a suspensive effect nor is precautionary in nature, and therefore does not prevent the enforcement of a final and unappealable judgment; it is an action that can take years to complete and that is exclusively intended to remedy blatant judicial errors, and it would not be the appropriate means to argue whether a decision is proper.

8. The State, in turn, alleges that Macedo did not exhaust the effective domestic remedies appropriate to the circumstances of the specific case, and that the inter-American system cannot be used as an alternative means of litigating national cases, thereby preventing a domestic debate of the issues. It submits that the petitioner could have filed a writ of habeas corpus, an extraordinary appeal, a criminal review action, and a civil action for damages. In relation to habeas corpus, the State highlights the ease, speed, and effectiveness of the measure. It additionally points out that, although the Federal Constitution only provides for an extraordinary appeal for the STF to review the constitutionality of laws, the Court has also

<sup>7</sup> Presidency of the Republic of Brazil. Code of Criminal Law. Decree-Law No. 3.689. October 3, 1941. Article 621: The review of completed proceedings shall be admissible: I- when the conviction is contrary to the express text of the criminal law or the evidence in the record; II- when the conviction is based on testimony, tests, or documents that are proven to be false; [and] III- when, after the conviction, new evidence is discovered of the defendant's innocence or of a circumstance that determines or authorizes a special reduction in the sentence.

already carried out “conventionality control” of the laws within the scope of this appeal. It underscores that the STF has already said that this appeal can be filed against a decision handed down by an appeals chamber of the Special Civil and Criminal Court [*Turma Recursal de juizado especial cível e criminal*]. It further maintains that, although there is no express provision in the law authorizing the filing of an action for review before the Special Criminal Courts [*Juizados Especiais Criminais*], the case law of the Supreme Court of Justice makes clear that this action is applicable to them and that it can be used to reverse cases involving errors of law when the conviction is contrary to the express text of the criminal law.

9. The Commission reiterates that the exhaustion of domestic remedies requirement does not mean that alleged victims are required to exhaust all available remedies. In this regard, the IACHR has maintained that “If the alleged victim endeavored to resolve the matter by making use of a valid, adequate alternative available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled.”<sup>8</sup> In the instant matter, the Commission observes that, for purposes of the admissibility analysis, the alleged victim exhausted the ordinary remedy of appeal provided for with respect to the offense of criminal defamation, in order to assert his allegedly violated rights and, therefore, the petition meets the requirement set forth in Article 46.1.a of the Convention. With respect to the filing deadline, insofar as the decision terminating the domestic proceedings was issued by the Court of Appeals on June 25, 2012, and the petition was filed on August 16, 2012, the Commission finds that it meets the requirements of Articles 46.1(b) of the ACHR.

10. Finally, the Commission notes that the petitioner contends that the criminal defamation conviction resulted in clear pain and suffering to the alleged victim. The petitioner also maintains that the State, by failing to apply the ACHR and ensure the alleged victim’s acquittal with respect to the offense of criminal defamation, committed a judicial error. Because of this, it asserts that Macedo should be compensated pursuant to Article 10 of the ACHR. The State, in turn, mentions that the petitioner has not brought a domestic civil action to seek redress for pecuniary or non-pecuniary damages, and points out that the Federal Constitution provides for compensation to a convicted person in case of judicial error. It also clarifies that a party’s dissatisfaction with a court decision does not amount to judicial error. Consequently, it asserts that the alleged victim should have sought redress domestically, either through a criminal review action or an action for civil damages. In light of the foregoing, the Commission notes that the petitioner has not provided information on the exhaustion of domestic remedies with respect to this issue, and therefore concludes that it cannot consider the requirement set forth in Article 46.1.a of the ACHR to have been satisfied with respect to an alleged violation of Macedo’s right to compensation for judicial error.

## VII. ANALYSIS OF COLORABLE CLAIM

11. In the present petition, the IACHR appreciates that it is dealing with the application of the legal concept of criminal defamation. On a number of occasions the IACHR has found that criminal defamation is incompatible with the ACHR because it lends itself to abuse as a means of silencing ideas and opinions, thereby repressing speech that is vitally important for the effective functioning of democratic institutions. The use of criminal defamation laws to protect the honor of public officials acting in an official capacity unjustifiably gives them a right to protection not available to other members of society. In addition to direct restrictions, such laws indirectly restrict freedom of expression because they bring with them the threat of jail or fines for those who insult or offend a public official.

12. In view of the legal and factual considerations put forward by the parties and the nature of the matter brought before it, the Commission finds that the existence of the criminal defamation provision in force in Brazil’s legal system, its supposedly broad scope, and its specific application to the alleged victim with the resulting criminal defamation charges, could constitute *prima facie* violations of Articles 7.2 (personal liberty), 13 (freedom of expression) and 25.1 (judicial protection) of the American Convention.

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<sup>8</sup> IACHR, Report No. 70/04, Petition 667/01, Admissibility, Jesús Manuel Naranjo Cárdenas et al., Pensioners of the Venezuelan Aviation Company VIASA. Venezuela, October 15, 2004, para. 52.

Both provisions are admissible in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) of the American Convention.

**VIII. DECISION**

1. To find the instant petition admissible in relation to Articles 7.2, 13 and 25.1 of the American Convention, in relation to Articles 1.1 and 2 thereof;
2. To find the instant petition inadmissible in relation to Article 10 of the American Convention;  
and
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 31<sup>th</sup> day of the month of December, 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.