

OEA/Ser.L/V/II.
Doc. 78
5 May 2019
Original: Portuguese

REPORT No. 70/19
PETITION 858-09
REPORT ON ADMISSIBILITY

LUIZ JOSÉ DA CUNHA “CRIOULO” AND FAMILY
BRAZIL

Approved Electronically by the Commission on May 5, 2019.

Cite as: IACHR, Report No. 70/19. Petition 858-09. Admissibility. Luiz José da Cunha “Crioulo” and family. Brazil. May 5, 2019.



I. INFORMATION ABOUT THE PETITION

Petitioning Party:	Center for Justice and International Law (CEJIL); Santos Dias Center for Human Rights of the Archdiocese of São Paulo (MTNM, Portuguese acronym); Inter-American Foundation for the Defense of Human Rights (FIDDH); Torture Never Again Movement of Pernambuco
Alleged victims:	Luiz José da Cunha "Crioulo" and family
State denounced:	Brazil ¹
Rights invoked:	Articles 3 (juridical personality), 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 13 (freedom of thought and expression), and 25 (judicial protection), as pertains to articles 1(1) (obligation to respect rights) and 2 (domestic legal effects) of the American Convention on Human Rights ² ; Articles I (life, liberty, personal security and integrity), XVII (recognition of juridical personality and civil rights), XVIII (fair trial), XXV (protection from arbitrary arrest), and XXVI (due process of law) of the American Declaration on the Rights and Duties of Man ³ ; and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture

II. PROCEDURE BEFORE THE IACHR⁴

Filing of the petition:	July 14, 2009
Notification of the petition to the State:	June 25, 2013
State's first response	September 27, 2013
Additional observations from the petitioner:	February 5 and June 20, 2014
Additional observations from the State:	April 24, 2014

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes, under the terms of Section VII
Competence <i>Ratione materiae</i>:	Yes, under the terms of Section VII ⁵

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

Duplication of procedures and International <i>res judicata</i>:	No
---	----

¹ As provided in Article 17(2)(a) of the Regulations of the Commission, Commission Member Flávia Piovesan, a Brazilian national, did not participate in the debate or in the decision on this matter.

² Hereinafter, "American Convention"

³ Hereinafter, "American Declaration"

⁴ Each party's observations were appropriately delivered to the opposing party.

⁵ American Declaration (OAS Charter deposited on March 13, 1950); American Convention (adopted on September 25, 1992); and Inter-American Convention to Prevent and Punish Torture (instrument deposited on July 20, 1989).

Rights declared admissible:	Articles 3 (juridical personality), 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (fair trial) and 25 (judicial protection), as pertains to articles 1(1) (obligation to respect rights) and 2 (domestic legal effects) of the American Convention; Articles 1 (life, liberty, personal security and integrity), XVII (recognition of juridical personality and civil rights), XVIII (fair trial), XXV (protection from arbitrary arrest), and XXVI (due process of law) of the American Declaration; 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, under the terms of Section VI
Timeliness of the petition:	Yes, under the terms of Section VI

V. ALLEGED FACTS

1. The petitioning organizations assert that Luiz José da Cunha (hereinafter, “alleged victim” or “Mr. Cunha”), known as “Crioulo”, was a student director of the Communist Party of Brazil as a high school student, and one of the first to join the National Liberation Alliance [*Aliança Libertadora Nacional*] (hereinafter, “ALN”). The petitioners claim that despite the State has acknowledged that Mr. Cunha was a victim of the dictatorship, the State agents responsible for those violations were never held liable, owing to the enactment of the Amnesty Law (Law 6683/1979) and the expiration of the statute of limitations to prosecute.

2. The petitioners indicate that Mr. Cunha was a victim of arbitrary detainment, forced disappearance, torture, and extrajudicial execution, on July 13, 1973, in the city of São Paulo, by members of the Information Operations Detachment of the Army’s Center for Internal Defense Operations (hereinafter, DOI-CODI/SP). They point out on that on the following day a newspaper with circulation in the capital city of São Paulo published an article about the alleged victim’s death in an armed conflict with members of the DOI-CODI/SP, supposedly after reacting violently when approached by military agents in the street. Not until May 20, 1992, in an article published by *Veja* magazine, was it revealed that an undercover agent had identified Mr. Cunha to military bodies and that he had been executed in an ambush organized by the repression apparatus of the State. They further claim that when they obtained access to the archives of the State Department of Law and Social Order (hereinafter, “DEOPS”), they discovered photos of the alleged victim’s body and verified the clear signs of torture that had not been mentioned in forensic reports. With the photos and reports in their possession, Mr. Cunha’s family took the case to the Special Commission on Political Deaths and Disappearances (hereinafter, “CEMDP”), which acknowledged the falsity of the official version that had been published at the time of the events and concluded that it was true that the alleged victim had been subject to arbitrary arrest, forced disappearance, torture, and execution on July 13, 1973. As reparations, Mr. Cunha’s next of kin received an indemnity payment in the amount of R\$ 111,360.11 [*reais*], under the terms of Article 11 of Law No. 9.140/95⁶.

3. The petitioning organizations argue that the documents found at DEOPS also indicate that the body of the alleged victim was buried in an indigent’s grave in the Dom Bosco Cemetery, in Perus, in the city of São Paulo. Though his mortal remains were located in 1991, they were only identified in 2006, after pressure by his family and intervention by the Federal Prosecutor’s Office (hereinafter, “MPF”). Lastly, the petitioners emphasize that the Amnesty Law and the expiration of the statute of limitations for prosecution of the state agents responsible for serious human rights violations during the dictatorship were obstacles to the full reparation of the victims, prosecution of those responsible, and knowledge of the truth.

⁶ Article 11. Indemnification, as reparations, will consist of a payment in the exact amount of R\$ 3,000 [*reais*] multiplied by the number of years of life expectancy had the disappeared person survived, taking into consideration the age at the time of the disappearance and the criteria and values contained in the table in Annex II of this Law. § 1: Under no circumstance will the value of the indemnity payment be less than R\$ 100,000 [*reais*]. §2: The indemnity payment will be granted by decree of the President of the Republic following issuance of a favorable opinion by the Special Commission created by this Law.

4. The State, in its memorials, corroborates the version of the facts presented by the petitioning organizations. However, it argues that the Commission should be declared not competent *ratione temporis* to hear the violations that pertain to the American Convention, as the alleged facts occurred before Brazil ratified the treaty. The State claims that the crime of forced disappearance is not a colorable claim in this case, given that the victim's mortal remains were identified in 2006. Thus, the State asserts, there is no reason to speak of a continuing crime, which removes the Commission's competence to hear the case. Furthermore, the State affirms that there were no violations of the other articles of Inter-American documents mentioned by the petitioners, because the State has expended all effort to take every measure necessary to mitigate the effects of the alleged victim's death, particularly as pertains to clarification of the facts and indemnification of the alleged victim's family.

5. The State also claims that the alleged victim's family learned of his death that same year, given the fact that the news was widely reported in the newspapers. The State also asserts that Maria Madalena da Cunha, the alleged victim's mother, granted a power-of-attorney to Maria do Amparo Almeida Araújo, the alleged victim's partner, so that a request might be made to have of her son's mortal remains transferred from the Cemetery of Perus, in São Paulo, where they were buried, to Recife, in the state of Pernambuco.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

6. The petitioners claim that members of the MPF who had no specific criminal mandate requested that the Criminal Division of the Office of the Attorney-General initiate criminal prosecution of those liable for the crime of homicide by use of cruel means (torture) against Mr. Cunha. However, they state that after the domestic case had been opened, the representative of MPF who has mandated criminal prerogative over the case issued an opinion that the case should be closed, arguing that the rule that disallows statutes of limitations for crimes against humanity is not enforceable in Brazil. The petitioners claim that the Federal Judge of the 1st Criminal Court of São Paulo sided with that opinion. The petitioning organizations state that it is not possible to appeal this decision under Brazilian rules of legal procedure.

7. For its part, the State claims that civil-public inquiry No. 06/99 was initiated, the conclusion of which led to the criminal investigative procedure that was initiated in 2008. However, this action did not result in a referral of criminal charges, so the Amnesty Law was never invoked, according to the ruling of January 9, 2009. Lastly, in countering the argument that there was no access to justice, the State claims that the alleged victim's family had access to the proceedings of the CEMDP and that the Prosecutors of the Republic were able to initiate criminal prosecution, although the case ultimately was closed.

8. In similar cases, the Commission has stated its position, that the application of statutes of limitations to cases of alleged crimes against humanity, and the fact that Brazil's Amnesty Law was in force, make it impossible to investigate individual liability and to punish the state agents involved in the case⁷. Thus, the Commission views as applicable the exception to the exhaustion of domestic remedies provided in Article 46.2(a) of the American Convention. Furthermore, as for timeliness in lodging the petition, the Commission considers that, because the ongoing impunity for the violations committed against the alleged victim is a result of the expiration of the statute of limitations for prosecution, and because of the Amnesty Law, applicable to this case and allegedly still in force to this day, the timeliness standard for filing petitions is satisfied⁸.

VII. ANALYSIS OF COLORABLE CLAIM

9. In view of the factual and legal elements presented by the parties and the nature of the matter presented, the Commission considers that the alleged facts, if proven, could characterize the State's international responsibility for the forced disappearance, torture and execution of Luiz José da Cunha, as well

⁷ IACHR, Report No. 80/12. Petition 859-09. Admissibility. Vladimir Herzog et al. Brazil. November 8, 2012, Paragraph 28.

⁸ IACHR, Report No. 80/12. Petition 859-09. Admissibility. Vladimir Herzog et al. Brazil. November 8, 2012, Paragraph 38.

as the lack of investigation and punishment of the state agents responsible for these violations, as well as the impact of impunity and the denial of justice in his family.⁹

10. The State indicates that the petition must be declared inadmissible because of the lack of competence *ratione temporis* of the Commission, given that the alleged facts occurred before the date of entry into force of the American Convention for Brazil, on September 25, 1992.

11. On this point, the Commission emphasizes that in relation to any member state that has not yet ratified the Convention, the fundamental rights that must be preserved are those contained in the OAS Charter, as well as those stipulated in the American Declaration, which is a source of international obligations from the moment a State decides to integrate the Organization of American States. The Statute and the Rules of Procedure of the Commission establish additional rules regarding the exercise of the competence of this *corpus iuris*. Based on the information provided by the parties, the Commission verifies that it already had competence in relation to the American Declaration and, once the American Convention for Brazil was in effect, it became the main source of legal obligations in the scope of the Inter-American System. In this sense, on the alleged violations that occurred after September 1992, the Commission will apply the American Convention and, therefore, declares its jurisdiction *ratione temporis* regarding the complaints presented by the petitioners.¹⁰

12. Concerning the Inter-American Convention to Prevent and Punish Torture, despite its ratification after the alleged disappearance, the Commission emphasizes that it has been interpreted in multiple cases by the application of its articles 1, 6 and 8. In the present case, the occurrence or non-occurrence of violations related to the failure to investigate the acts of torture and the effects caused by impunity to the alleged victim's family may be analyzed in the merits stage. In the context, both the Commission and the Inter-American Court have already declared violations of these provisions in other cases, on the understanding that the third paragraph of Article 8 incorporates a general clause of jurisdiction accepted by the States when ratifying or acceding to said instrument.¹¹

13. If proven, the facts could characterize violations of the rights protected by articles 3 (juridical personality), 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (fair trial) and 25 (judicial protection), as pertains to articles 1(1) (obligation to respect rights) and 2 (domestic legal effects) of the American Convention; Articles I (life, liberty, personal security and integrity), XVII (recognition of juridical personality and civil rights), XVIII (fair trial), XXV (protection from arbitrary arrest), and XXVI (due process of law) of the American Declaration; and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

14. Finally, the Commission decides to declare not admissible Article 13 of the American Convention, since there are no elements to establish *prima facie* its possible violation.

VIII. DECISION

1. To declare admissible this petition as it relates to Articles 3, 4, 5, 7, 8, and 25 of the American Convention; Articles I, XVII, XVIII, XXV, and XXVI of the American Declaration; and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture;

2. To declare inadmissible this petition as it relates to Article 13 of the American Convention;

3. To notify the parties about this decision; proceed with the analysis of merits of the matter, and to publish this decision and include it in the Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 5th day of the month of May, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice

⁹ IACHR. Report 84/17. Petition 188-11. Admissibility. Marcos Luis Abarca Zamorano et al. Chile. June 7, 2017, Paragraph. 14; IACHR. Report 35/18. Petition 31-07. Admissibility. Juan Carlos Menanteau Aceituno and Yasmín Eriksen Fernández Acuña. Chile. May 4, 2018, Paragraph. 8.

¹⁰ IACHR. Report 3/15. Natalio Kejner, Remón Walton Ramis y otros. Admisibilidad. Argentina. January 29, 2015, Paragraph. 52.

¹¹ I/A Court H.R. Case Favela Nova Brasília Vs. Brazil. Preliminary Objection, Merits, Reparations and Costs. Judgement of February 16, 2017, Paragraph. 61.

President; Margarete May Macaulay, Francisco José Eguiguren Praeli, and Luis Ernesto Vargas Silva, Commissioners.