

REPORT No. 80/12
PETITION P-859-09
VLADIMIR HERZOG *ET AL.*
ADMISSIBILITY
BRAZIL
November 8, 2012

I. SUMMARY

1. On July 10, 2009, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the IACHR”) received a petition against the Federative Republic of Brazil (“the State” or “Brazil”), alleging the State's international responsibility for the arbitrary detention, torture, and death of journalist Vladimir Herzog (“the alleged victim”)—which took place at an army facility on October 25, 1975—and the ongoing impunity for these acts because of an amnesty law enacted during Brazil’s military dictatorship. The foregoing, according to the arguments presented, constitutes a violation of Articles I, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man (“the American Declaration”); Articles 1, 2, 5, 8, and 25 of the American Convention on Human Rights (“the American Convention”); and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. The petition was lodged by the Center for Justice and International Law (CEJIL/Brazil), the Inter-American Foundation for the Defense of Human Rights (FIDDH), the “Santo Dias” Center of the Archdiocese of São Paulo, and the “No More Torture” Group of São Paulo (“the petitioners”).

2. The State preliminarily contends that there is no omission with respect to the facts alleged in this petition, as it has formally recognized that it is responsible for the death and arbitrary detention of the alleged victim. Moreover, the State maintains that the IACHR lacks competence *ratione temporis* to examine alleged violations of the American Convention or the Inter-American Convention to Prevent and Punish Torture, as the alleged violations were carried out before Brazil's ratification of those instruments. Further, the State argues that the petition was untimely, in accordance with the requirements contained in Article 46.1.b of the American Convention and Article 32 of the IACHR Rules of Procedure. On this point, the State maintains that the relevant remedies under domestic law were exhausted either on August 28, 1979, with the enactment of the Brazilian amnesty law, or on August 18, 1993, with the decision by the Superior Court of Justice that confirmed the judgment of the São Paulo Court of Justice closing the police investigation into the alleged victim’s death, in application of the amnesty law.

3. Without prejudging the merits of the case and in accordance with the provisions of 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 I, IV, XVIII, and XXV of the American Declaration; Articles 5.1, 8.1, and 25 of the American Convention, in conjunction with the general obligations established in Articles 1.1 and 2 of the same instrument; and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. Conversely, the IACHR finds that the petitioners' arguments do not lay out facts that would characterize a violation of Article XXVI of the American Declaration. The IACHR also decides to notify the parties, publish this report, and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCEEDINGS BEFORE THE IACHR

4. The petition was received on July 10, 2009. The IACHR forwarded the relevant parts of the petition to the State on March 27, 2012. The State responded via notes received on May 29, May 30, and June 18, 2012. The IACHR forwarded these communications to the petitioners. The petitioners sent in additional information on July 16, 2012. That communication was forwarded to the State. The State sent in additional information on October 1, 2012. That communication was forwarded to the petitioners.

III. POSITION OF THE PARTIES

A. Position of the Petitioners

5. The petitioners state that the facts in this matter took place in the context of a systematic practice of arbitrary detentions, acts of torture, and extrajudicial executions perpetrated by State security forces against journalists, students, attorneys, members of the Catholic Church, union leaders, and political dissidents in general, as part the installation in Brazil of a military dictatorship that began with a coup d'état on March 31, 1964, and continued until 1985.

6. In this context, Vladimir Herzog, a 38-year-old journalist¹ and editor in chief of the television station “TV Cultura,” was purportedly viewed by the military regime as an “enemy of the State” because of journalistic articles he had published—in particular, a 1974 “historical account” that analyzed the first decade of the military takeover in Brazil. Subsequently, according to the petitioners, on the night of October 24, 1975, agents of the Second Army’s Department of Information Operations of the Center for Internal Defense Operations (“DOI/CODI”) in São Paulo summoned the alleged victim to give a statement at that organization’s headquarters, and tried to locate and arrest him, without success. Nevertheless, the petitioners state, the alleged victim appeared of his own accord at DOI/CODI headquarters the following day, October 25, 1975, to offer a statement. He was arbitrarily detained, without any warrant from a competent judicial authority.

7. According to the petitioners, that same day the then-commander of the DOI/CODI disclosed publicly that the alleged victim had died in his cell, supposedly by suicide. The petitioners contend that the alleged victim’s death was an extrajudicial execution carried out by torture, and that it was made to look like a suicide, in line with an established practice during Brazil’s military dictatorship. According to the petitioners, his death shocked Brazilian society and raised awareness about the widespread practice of torturing political prisoners.

8. Following the alleged victim’s death, the petitioners say, a military police investigation was begun (“IPM” No. 1.173/75), which determined the cause of his death to be suicide by hanging. As a result, the military police investigation was reportedly closed by the military justice system on March 8, 1976. However, the petitioners state that the alleged victim’s next of kin—Clarice Herzog (widow) and Ivo Herzog and André Herzog (sons)—filed a civil action for declaratory judgment (*Ação Declaratória* No. 136/76), in which they requested that the Federal Union be declared responsible for the arbitrary detention, torture, and subsequent death of the alleged victim, and sought appropriate compensation. According to the petitioners, the aforementioned civil action was filed after evidence had been discovered that led to the conclusion that the alleged victim’s death by torture had been made to look like a suicide—in particular, testimony from other political prisoners who were reportedly in the DOI/CODI facility in São Paulo and heard the alleged victim being tortured to death.

¹ The petitioners indicate that the alleged victim was born in Croatia in 1937.

9. The petitioners point out that the civil action fully established—by means of a judgment issued on October 28, 1978—that the alleged victim was arbitrarily detained, tortured, and killed on DOI/CODI premises in São Paulo. Nevertheless, the petitioners contend that subsequent to that decision, on August 28, 1979, Law No. 6.683 (“the amnesty law” or “Law 6.683/79”) was passed, which did away with criminal responsibility for all individuals who had committed “political or related crimes” in the period from September 2, 1961, to August 15, 1979.² The petitioners contend that to this day, the amnesty law in question continues to represent an obstacle for the criminal prosecution of serious human rights violations, such as the acts alleged in this petition, and that it is therefore incompatible with the State’s obligations under the American Convention.

10. Despite the foregoing, the petitioners describe several subsequent attempts made to bring about the criminal prosecution of those responsible for the death of the alleged victim. In this regard, they observe that the São Paulo State Public Prosecutor’s Office asked the Civil Police to begin an investigation into the alleged victim’s death in 1992, after an article was published in the magazine *Isto É, Senhor*, on March 25, 1992. In the story, a DOI/CODI official who went by the alias “Captain Ramiro” stated that he had interrogated the alleged victim in the aforesaid military establishment and that he was involved in his death. The petitioners state that “Captain Ramiro” filed a *habeas corpus* appeal before the Fourth Chamber of the São Paulo Court of Justice, which determined that the police investigation should be closed because of the amnesty law. That decision was reportedly appealed by the São Paulo State Public Prosecutor’s Office, but was upheld by the Superior Court of Justice on August 18, 1993.

11. The petitioners observe that, more recently, several supervening events have shed new light on the human rights violations committed during the Brazilian dictatorship. These include the enactment, in 1995, of Law No. 9.140/95, in which the State recognized its responsibility for the deaths and disappearances that took place during the time of the military regime; the subsequent creation of the Special Commission on Political Deaths and Disappearances; the publication, in 2007, of the Special Commission’s report, “Right to Memory and Truth”; and the judgment handed down on November 24, 2010, by the Inter-American Court of Human Rights (“the Inter-American Court”) with respect to the Case of Gomes Lund *et al.* (“*Guerrilha do Araguaia*”), among others. The petitioners stress that in the book “Right to Memory and Truth,” the State recognized its responsibility for the alleged victim’s death by torture.

12. The petitioners observe that, based on the aforementioned new facts and based on international law, on March 5, 2008, members of the São Paulo Federal Public Prosecutor’s Office—which lacked criminal jurisdiction—asked the São Paulo Attorney General of the Republic to instruct civil servants in the criminal section of the Federal Public Prosecutor’s Office to begin an investigation into the alleged victim’s death. According to the petitioners, that request was based on the fact that the federal justice system would have jurisdiction over that investigation, as the DOI/CODI agents were federal agents; that this involved a crime against humanity with no statutory limitations and not covered by amnesty; and based on the international obligations of the Brazilian State, including those established in the American Convention.

13. According to the petitioners, the representative of the Federal Public Prosecutor’s Office responsible for the criminal section disagreed with his colleagues and sought to have the case closed. The petitioners indicate that the process was closed based on a decision issued January 12, 2009, by the federal judge in charge. In that judgment, the federal judge recognized that the original jurisdiction belonged to the federal justice system; however, she determined that the decision

² The petitioners cite Article 1 of the amnesty law, available at: http://www.planalto.gov.br/ccivil_03/leis/L6683.htm.

adopted earlier by the São Paulo State Court constituted material *res judicata* and that the statutory limitations for the crimes perpetrated against the alleged victim had expired.

14. According to the petitioners, that decision effectively exhausted their remedies under domestic law, and their petition is admissible with respect to violations of Articles I, XVIII, XXV, and XXVI of the American Declaration; Articles 1, 2, 5, 8, and 25 of the American Convention; and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

B. Position of the State

15. The State preliminarily contends that it has not committed an omission with respect to the acts denounced in this petition, and that in fact it has formally recognized its responsibility for the death and arbitrary detention of the alleged victim. In effect, the State maintains that it has adopted a series of reparation and non-repetition measures related to the alleged victim's death. The State points out that in March 1996, the Special Commission on Political Deaths and Disappearances recognized the State's responsibility for the death of the alleged victim, in accordance with the provisions of Article 4, I, "b" of Law No. 9.140/95, and that as a result, it granted monetary reparations to his widow, Clarice Herzog. The State notes that the alleged victim's death played a fundamental role in the process of re-democratization in Brazil by exposing the human rights violations perpetrated against political prisoners.

16. Further, the State refers to various initiatives adopted in order to preserve the alleged victim's right to memory, for example, the launch of the book "Right to Memory and Truth," produced by the Special Commission on Political Deaths and Disappearances, which includes an account of the alleged victim's professional career and the violations carried out against him. The State also observes that in 2009 it supported the creation of the "Vladimir Herzog Institute," with the goal of helping to protect the right to life and access to justice. In December 2011, the State adds, the Human Rights Secretariat of the Office of the President of the Republic awarded the Vladimir Herzog Institute the national human rights prize, in the "Truth and Memory" category, for its project "Resisting Is Necessary" (*Resistir é preciso*), sponsored by the federal government. Moreover, the State points to the creation, on May 16, 2012, of the National Truth Commission, instituted under Law No. 12.528, dated November 18, 2011.

17. With respect to the petition's admissibility requirements, the State contends, first of all, that the petition is inadmissible because the IACHR lacks competence *ratione temporis* to examine alleged violations of the American Convention or the Inter-American Convention to Prevent and Punish Torture. In that regard, the State maintains that the alleged violations were carried out prior to Brazil's ratification of those instruments, on September 24, 1992, and September 6, 1989, respectively. In other words, Brazil contends that the ratification of both instruments took place after the acts of torture against the alleged victim, on October 25, 1975.

18. Moreover, the State argues that the petition is also inadmissible because it was untimely, and thus does not meet the requirements established in Article 46.1.b of the American Convention and Article 32 of the IACHR Rules of Procedure. On that point, the State maintains that the relevant dates to analyze the deadline for lodging this petition are either August 28, 1979, or August 18, 1993. In either case, according to the State, the petition was lodged outside the period of six months established in Article 46.1.b of the American Convention; nor was it lodged within a reasonable period of time, as established in Article 32.2 of the Inter-American Commission's Rules of Procedure.

19. With respect to the first date, the State observes that, in the context of the civil action for declaratory judgment filed by the alleged victim's next of kin, a judgment was handed down on October 12, 1978, and determined the Federal Union's responsibility and the appropriate

monetary compensation. In addition, that decision determined that the record of the proceedings should be forwarded to the Office of the Attorney General for Military Justice, so that it could adopt the relevant criminal measures. However, the State adds, on August 28, 1979, Law No. 6.683/79 was passed, which established amnesty for everyone who had committed “political or related crimes.” Thus, the State concludes, the enactment of the amnesty law effectively exhausted domestic remedies, and at the same time has blocked State initiatives to pursue the criminal prosecution of those responsible for the death of the alleged victim. Thus, the petition lodged on July 10, 2009, would not meet the requirement established in Article 46.1.b of the American Convention.

20. If the IACHR decides not to consider enactment of the amnesty law as the date for exhaustion of domestic remedies, the State alleges that the IACHR should determine that Law No. 6.683/79 effectively impedes access to remedies under domestic law, in accordance with the exception established in Article 46.2.b of the American Convention. Thus, under Article 32.2 of the IACHR Rules of Procedure, the petition must be lodged within a reasonable period of time. In this regard, the State maintains that the IACHR should take into account the date on which the alleged violation occurred and the circumstances of the case. In this case, the State concludes, the petition was not lodged within a reasonable period of time; that is, it was filed 30 years after the amnesty law was enacted and nearly 34 years after the alleged victim’s death.

21. Alternatively, the State observes that the IACHR should find that the remedies under domestic law were exhausted with the judgment of the Superior Court of Justice on August 18, 1993. It upheld on appeal the October 13, 1992, decision adopted by the State of São Paulo Court of Justice to close the police investigation into the alleged victim’s death. That decision, according to the State, confirms that the amnesty law effectively constitutes an obstacle to the criminal prosecution of those responsible for the violations perpetrated against the alleged victim. On this point, the State also contends that the attempt by the Federal Public Prosecutor’s Office to initiate a new investigation in the federal justice system does not open the door for a new time frame to begin for the petitioners’ access to the inter-American system, and that it is therefore not reasonable for the petitioners to have only just lodged this petition on July 10, 2009.

22. Finally, the State maintains that the complete inadmissibility of this petition is clear under Article 47.c of the American Convention, because the State has undertaken every possible effort to mitigate the damages related to the death of the alleged victim. In that regard, the State asserts that the National Truth Commission, created on May 16, 2012, is already investigating the circumstances and the facts, as well as the possible perpetrators, of the violations committed against the alleged victim. Along these lines, the State emphasizes that, based on a request presented by the alleged victim’s next of kin, the National Truth Commission requested correction of the alleged victim’s death certificate before the Second Court of Public Records, on September 24, 2012. In fact, according to the State, the judicial authority determined that the document should be corrected to state that the death was the result of “injuries and abuse suffered during an interrogation at an army facility in São Paulo.”

23. In conclusion, based on all the foregoing arguments, the State requests that the Inter-American Commission declare this petition to be inadmissible, in accordance with Article 47 of the American Convention.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

24. The petitioners are authorized to lodge petitions with the Inter-American Commission, under Article 44 of the American Convention. The alleged victims—Vladimir Herzog and his next of kin: Clarice, Ivo, and André Herzog—are persons for whom the State has made a commitment to respect and guarantee the rights recognized in that international instrument. With regard to the State, Brazil ratified the American Convention on September 25, 1992, and thus the Inter-American Commission has jurisdiction *ratione personae* to examine the petition. Under Article 23 of its Rules of Procedure, the IACHR is also competent *ratione materiae*, as the petition refers to alleged human rights violations protected by the American Declaration, the American Convention, and the Inter-American Convention to Prevent and Punish Torture. With respect to this last instrument, the IACHR observes that Brazil deposited the respective instrument of ratification on July 20, 1989.

25. As to its jurisdiction *ratione temporis*, the IACHR notes that the purported arbitrary detention, torture, and death of the alleged victim reportedly occurred on October 25, 1975, before Brazil had ratified the American Convention and the Inter-American Convention to Prevent and Punish Torture. Therefore, the applicable source of that right is initially the American Declaration.³ Nevertheless, the IACHR notes that for the events that occurred as of July 20, 1989, and September 25, 1992—in line with the ratification dates mentioned above—or those events that could appropriately be considered a situation involving an ongoing violation of rights that would continue to exist after those dates, the Inter-American Commission has jurisdiction *ratione temporis* to examine this petition under the American Convention and the Inter-American Convention to Prevent and Punish Torture. On that point, and in view of the State's contention regarding the lack of jurisdiction *ratione temporis*, the IACHR notes that the petitioners' arguments with regard to these instruments refer to the ongoing impunity for these acts—which allegedly continues to this day because of the Brazilian amnesty law – as well as the law's incompatibility with the American Convention. As described *infra* (para. 34), the petitioners sustain that the criminal investigation about the facts in this case began by means of a request of the Public Prosecutor's Office on May 4, 1992, and this investigation was allegedly archived in accordance with a judgment of October 13, 1992 which applied the amnesty law. Thus this occurred when both the American Convention and the Inter-American Convention to Prevent and Punish Torture were already in force regarding Brazil.

26. Finally, the Inter-American Commission is competent *ratione loci* to hear the claim, as the petition alleges acts that reportedly took place within the territory of Brazil and that would constitute violations of rights protected in the American Declaration, the American Convention, and the Inter-American Convention to Prevent and Punish Torture.

B. Exhaustion of Domestic Remedies

27. Under Article 46(1) of the American Convention, for a petition to be admissible by the IACHR, the remedies offered under domestic law must have been exhausted, in accordance with generally recognized principles of international law. The second paragraph of Article 46 states that these provisions shall not be applicable when the domestic legislation does not afford due process of law for the protection of the right in question; when access to the remedies under domestic law

³ See, *mutatis mutandi*, IACHR. Report No. 5/11, Admissibility, Petition 702-03, *Ivan Rocha*, Brazil, March 22, 2011, para. 24; quoting, *inter alia*, I/A Court H.R., Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, July 14, 1989, Series A No. 10, paras. 35-45.

have been denied to the alleged victim; or when there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

28. As a preliminary matter, the Inter-American Commission observes that in cases such as this one, which allegedly implies criminal offenses that are prosecutable *sua sponte* in Brazil—the arbitrary detention, torture, and extrajudicial execution of a person—the suitable and effective remedy is a criminal investigation and a trial in the ordinary justice system. The IACHR notes that it is an uncontested fact, maintained by both the petitioners and the State (see paragraphs 9, 19, and 21, above), that the amnesty law is “an obstacle to the criminal prosecution of those responsible” for the violations perpetrated against the alleged victim. Previously, in its Admissibility Report on Petition 11.552 (*Araguaia Guerrilla Movement*), the IACHR observed that based on that law, “it is impossible to investigate individual responsibility and to punish the agents of the State involved in the case.”⁴ In its Report on the Merits in the same case, the Inter-American Commission determined that “the criminal investigation and punishment of those responsible for the forced disappearances of the victims ‘is precluded by the amnesty law approved in 1979, which is still in force’”⁵ Moreover, in its judgment in Case 11.552 the Inter-American Court confirmed, “Under said law, to date, the State has not investigated, processed, or criminally punished those responsible for the human rights violations committed during the military regime.”⁶

29. The IACHR has ruled repeatedly on the admissibility of petitions that refer to amnesty laws. In one of its first decisions on the subject, the IACHR observed the following, with regard to the admissibility of petitions related to the amnesty law in Uruguay:

In the Commission's judgment, the formal admissibility requirements set forth in Article 46.1 of the Convention and in Article 32 of the Commission's Regulations have been satisfied inasmuch as **the domestic legislation does not provide suitable and effective means** under which it would be at least legally possible to declare the effects of the law null and void; those effects make it impossible to obtain an impartial and exhaustive judicial investigation into the very serious human rights violations that have occurred in the past. The Uruguayan Supreme Court of Justice dismissed the cases that argued the unconstitutionality of the law.

As for the allegation that the domestic remedies have not been exhausted, the Commission would note that once the law was declared constitutional, its effect was to prevent continuation of the proceedings underway in the courts of the land. While Article 46.1.a of the Convention requires that the remedies under domestic law be pursued and exhausted first, **Article 46.2.a stipulates that said requirement shall not apply when “the domestic legislation of the State concerned does not afford due process of law for the protection of rights that have allegedly been violated.”** Therefore, the petitions cannot be considered inadmissible on the ground of a failure to exhaust the remedies under domestic law.⁷

⁴ IACHR. Report No. 33/01, Admissibility, Petition 11.552, *Julia Gomes Lund et al. (Araguaia Guerrilla Movement)*, Brazil, March 6, 2011, para. 57.

⁵ IACHR. Report No. 91/08, Merits, Case 11.552, *Julia Gomes Lund et al. (Araguaia Guerrilla Movement)*, Brazil, October 31, 2008, para. 98 (this corresponds to paragraph 112 of the application to the Inter-American Court).

⁶ I/A Court H.R. *Case of Gomes Lund et al. (“Guerrilla do Araguaia”) v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Series C No 219, para. 135.

⁷ IACHR. Report No. 29/92, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375, Uruguay, October 2, 1992, IV. ADMISSIBILITY, paras. 15 and 16 (emphasis ours). Along the same lines, see IACHR. Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311, Argentina, October 2, 1992, III. ADMISSIBILITY AND PROCESSING BY THE COMMISSION, para. 10.

30. The Inter-American Commission has reiterated that reasoning, for example with regard to the admissibility of petitions that refer to amnesty laws in Peru, in the following terms:

Regarding the alleged failure to investigate and punish the masterminds behind the La Cantuta massacre, the Commission notes that the trial in which certain individuals were convicted for the killings ended with a judgment by the Supreme Council of Military Justice on May 3, 1994. That judgment made no statement either convicting or acquitting those accused of having masterminded the massacre. Then, although a new investigation aimed at identifying the masterminds behind the incident could theoretically have been opened, Article 6 of Law No. 26479, in accordance with the terms of Article 3 of Law No. 26492, stipulates that **the Peruvian courts are prohibited from beginning any such investigation. Thus, given that Peru's internal legislation lacks an effective remedy for trying to determine the alleged responsibility of the masterminds, the exemption from the requirement of exhausting domestic law remedies, set forth in Article 46.2.a, applies.**⁸

31. Consequently, as it has ruled with respect to amnesty laws related to Argentina, Uruguay, and Peru, among others, the IACHR determines that this petition is admissible because Brazil's domestic law does not contemplate due process of law for the protection of the rights alleged to have been violated. The IACHR therefore applies to this petition the exception to the rule of prior exhaustion of domestic remedies established in Article 46.2.a of the American Convention.

C. Timeliness of the petition

32. Article 46.1.b of the American Convention establishes that for a petition to be considered admissible by the IACHR it must be lodged within a period of six months from the date on which the party alleging violation of rights was notified of the final judgment. The IACHR has established, above, the application of the exception of exhaustion of domestic remedies under Article 46.2.a of the American Convention. In that regard, Article 32.2 of the Inter-American Commission's Rules of Procedure establishes that in those cases in which exceptions to the prior exhaustion of domestic remedies apply, the petition shall be presented within a reasonable period of time, as determined by the IACHR. For this purpose, the Inter-American Commission should take into account the date on which the alleged violation of rights occurred and the circumstances of each case.

33. In the matter being examined, the IACHR observes that the alleged arbitrary detention, torture, and death of the alleged victim occurred on October 25, 1975. Nevertheless, the Inter-American Commission notes that the petition also claims that Law No. 6.683/79 is incompatible with the American Convention and alleges ongoing impunity with respect to the violations committed against the alleged victim, which presumably continue to this day by virtue of the existence of the Brazilian amnesty law.

34. In order to determine whether the petition was lodged within a reasonable time period, the IACHR deems it pertinent to point out that although Law No. 6.683/79 was enacted in 1979, it was not until 1992 that there was an attempt to criminally investigate the facts in this case. In fact, on May 4, 1992, Prosecutor Luiz Antonio Guimarães Marrey of the Public Prosecutor's Office decided to open a police investigation, based on new and supervening evidence,⁹ specifically statements made by a retired military officer known as "Captain Ramiro," which were published on March 25, 1992, in the magazine *Isto É, Senhor*.¹⁰ However, on July 21, 1992, "Captain Ramiro"

⁸ IACHR. Report No. 42/99, Admissibility, Petition 11.045, *La Cantuta*, Peru, March 11, 1999, para. 43 (emphasis ours). Along the same lines, see IACHR. *Application to the Inter-American Court of Human Rights against the Republic of Peru*, Case 11.528, *Barrios Altos*, para. 54, available at: <http://www.corteidh.or.cr/docs/casos/barrios/demanda.PDF>.

⁹ See Annex 8 of the initial petition.

¹⁰ See Annex 7 of the initial petition.

filed a *habeas corpus* appeal¹¹ with the Fourth Chamber of the São Paulo Court of Justice, which decided to close the police investigation by virtue of the amnesty law, on October 13, 1992.¹² The Attorney General in the Public Prosecutor's Office appealed that decision through a special appeal, on January 28, 1993.¹³ Nevertheless, on August 18, 1993, the Fifth Chamber of the Superior Court of Justice rejected this appeal and upheld the decision to close the police investigation.¹⁴

35. Subsequently, as has been laid out by both parties (see paragraphs 11 and 15, above), Brazil enacted Law No. 9.140/95, on December 4, 1995, in which it recognized its responsibility for the arbitrary detentions, torture, deaths, and forced disappearances that took place during the time of the military regime.¹⁵ The Commission observes that Law No. 9.140/95 also created the Special Commission on Political Deaths and Disappearances ("CEMDP"),¹⁶ and the CEMDP published its final report, "Right to Memory and Truth," in 2007.¹⁷ In that report, the CEMDP recounts what it establishes as violations perpetrated against the alleged victim, including his arbitrary detention, torture, and subsequent death, as well as the faked suicide at the DOI/CODI.¹⁸

36. On March 5, 2008, Eugênia Augusta Gonzaga Fávero and Marlon Alberto Weichert, prosecutors from the Federal Prosecutor's Office, asked the São Paulo Attorney General of the Republic to begin an investigation, through members of the Federal Public Prosecutor's Office, into the death of the alleged victim, based on the following new facts: the conclusions of the final report of the CEMDP on the death of the alleged victim; the international human rights obligations stemming from the American Convention; the non-applicability of statutory limitations to the crimes committed against the alleged victim and the amnesty law's non-applicability to those crimes; and the fact that the original jurisdiction to investigate and prosecute the crimes that purportedly were committed by federal agents—members of the army—was the federal judicial system.¹⁹ On January 9, 2009, the federal judge in charge issued a judgment in which she established that the prior decision adopted by the State Court of São Paulo constituted "material *res judicata*, [and therefore] the punishability of the crime is irremediably extinguished." She also determined that crimes against humanity do not have a valid definition under Brazilian domestic law and that the statutory limitation for the crime that may have been perpetrated against the alleged victim (aggravated homicide) had already expired. Consequently, the federal judge determined that the case should be closed.²⁰

37. Finally, the IACHR notes that the unconstitutionality of the Brazilian amnesty law, with regard to human rights violations perpetrated by agents of the State during the dictatorship, was recently invoked in domestic court, through an action called *Arguição de Descumprimento de*

¹¹ See Annex 11 of the initial petition.

¹² See Annex 12 of the initial petition.

¹³ See Annex 13 of the initial petition.

¹⁴ See Annex 14 of the initial petition.

¹⁵ I/A Court H.R. *Case of Gomes Lund et al. ("Guerrilla do Araguaia") v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Series C No 219, paras. 41 and 42.

¹⁶ I/A Court H.R. *Case of Gomes Lund et al. ("Guerrilla do Araguaia") v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Series C No 219, para. 43.

¹⁷ See references to this final report in I/A Court H.R. *Case of Gomes Lund et al. ("Guerrilla do Araguaia") v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Series C No 219, paras. 43, 44, 47, and 48, among others.

¹⁸ See Annex III of the State's response—Special Commission on Political Deaths and Disappearances. *Direito à Memória e à Verdade. Brasília: Secretaria Especial dos Direitos Humanos da Presidência da República*, 2007. Pages 407 and 408.

¹⁹ See Annex 16 of the initial petition.

²⁰ See Annex 19 of the initial petition.

Preceito Fundamental No. 153 (“Action of Incompliance with Fundamental Precept No. 153” or “ADPF No. 153”). That action was brought on October 21, 2008, by the Federal Council of the Brazilian Bar Association. The IACHR notes that on April 29, 2010, the Federal Supreme Court declared that ADPF No. 153 was inadmissible and upheld the validity and constitutionality of Law No. 6.683/79, through a decision that “has an *erga omnes* effect to which no remedy applies.”²¹

38. Based on all the foregoing, and especially taking into account that the petitioners are claiming that Law No. 6.683/79 is incompatible with the American Convention, and that there is ongoing impunity with respect to the violations perpetrated against the alleged victim—which presumably continues to this day because of the aforementioned amnesty law—the IACHR concludes that the petition was lodged within a reasonable period of time, and that it meets the requirement established in Article 32.2 of the IACHR Rules of Procedure. In adopting this decision, the IACHR is also taking into account the specific circumstances related to the successive attempts made by the São Paulo State Public Prosecutor’s Office, the Federal Public Prosecutor’s Office, and the Brazilian Bar Association to judicially challenge the validity of the Brazilian amnesty law— attempts that went on until the year 2010—as well as the successive events that took place beginning with the enactment of Law No. 9.140 in 1995, the subsequent creation of the CEMDP, and its final report published in 2007.

D. Duplication of proceedings and international *Res Judicata*

39. There is no indication in the record that the subject of this petition is pending settlement in another international proceeding or that the petition duplicates one previously examined by the Commission or by another international organization. Therefore, the requirements established in Articles 46.1.c and 47.d of the Convention have been satisfied.

E. Colorable claim

40. For purposes of admissibility, the Inter-American Commission must decide whether the facts alleged in the petition tend to establish a violation of rights guaranteed by the American Convention, as required by Article 47.b, or whether the petition should be rejected as “manifestly groundless” or “obviously out of order.” At this point of the proceedings, the IACHR must perform a *prima facie* evaluation, not to establish alleged violations of the American Convention or any other applicable treaty, but to determine whether the petition describes facts that could constitute violations of rights protected by inter-American instruments. This examination in no way constitutes a prejudgment on the merits of the matter.

41. 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 Commission, based on the system’s jurisprudence, to determine in its admissibility report which provisions of the relevant Inter-American instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements.

42. In this case, the petitioners claim that the alleged victim was arbitrarily detained, tortured, and killed by DOI/CODI agents on October 25, 1975, because of his activity as a journalist. The IACHR finds that, if proved to be true, such allegations—along with the pertinent acts that took place until July 20, 1989, and September 25, 1992—could constitute violations of Articles I, IV, XVIII, and XXV of the American Declaration. Furthermore, the IACHR deems that the petitioners’ claims do not lay out facts that would constitute a violation of Article XXVI of the

²¹ I/A Court H.R. *Case of Gomes Lund et al. (“Guerrilla do Araguaia”) v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Series C No 219, para. 136.

American Declaration, and therefore the petition is admissible on that point, under Article 47.b of the American Convention.

43. In addition, with respect to the supposed incompatibility of Law No. 6.683/79 with the American Convention, the concrete application of the amnesty law to the present case by virtue of the October 13, 1992 judgment and subsequent proceedings, the alleged failure of the State to duly investigate the facts, as well as the ongoing impunity with respect to the violations perpetrated against the alleged victim, the IACHR determines that, if proved to be true, such claims could constitute violations of Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture as of July 20, 1989, and of Articles 8.1 and 25 of the American Convention, in conjunction with Articles 1.1 and 2 of the same treaty, as of September 25, 1992. Finally, the IACHR reiterates that in cases involving serious human rights violations, combined with the presumably ongoing absence of a criminal investigation into the facts, alleged victims' family members can also find their personal integrity compromised, by virtue of the resulting suffering, anguish, and frustration. Therefore, the IACHR finds that the alleged victim's next of kin are also alleged victims of possible violations of Article 5.1 of the American Convention.

V. CONCLUSION

44. The Inter-American Commission concludes that it is competent to hear this case on the merits, and decides that the petition is admissible in accordance with Articles 46 and 47 of the American Convention. Based on the arguments in fact and in law set forth above, and with no prejudgment on the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES TO:

1. Declare this petition admissible with respect to the alleged violation of the rights protected in Articles I, IV, XVIII, and XXV of the American Declaration; Articles 5.1, 8.1, and 25 of the American Convention, in conjunction with Articles 1.1 and 2 of the same instrument; and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture;
2. Declare this petition inadmissible with respect to Article XXVI of the American Declaration;
3. Notify both parties of this decision;
4. Continue with the analysis of the merits of the case; and
5. Publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on the 8 day of the month of November, 2012. (Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Felipe González, Second Vice-President; Dinah Shelton, Rodrigo Escobar Gil, Rosa María Ortiz, and Rose-Marie Antoine, Commissioners.