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**REPORT No. 115/20**  
**PETITION 562-11**  
REPORT ON ADMISSIBILITY

JOSÉ CARLOS DA SILVA AND FAMILY MEMBERS  
BRAZIL

Approved electronically by the Commission on April 25, 2020.

**Cite as:** IACHR, Report No. 115/20. Petition 562-11. Admissibility. José Carlos da Silva and family members. Brazil. April 25, 2020.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Justiça Global
<b>Alleged victim:</b>	José Carlos da Silva and family members <sup>1</sup>
<b>Respondent State:</b>	Brazil <sup>2</sup>
<b>Rights invoked:</b>	Articles 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (judicial guarantees), 11 (protection of honor and dignity), and 25 (judicial protection), all related to Articles 1(1) (obligation to respect the rights) and 2 (obligation to adopt provisions of domestic law) of the American Convention on Human Rights <sup>3</sup> ; and Articles 1, 6, 7, 8, and 9 of the Inter-American Convention to Prevent and Punish Torture

**II. PROCEEDINGS BEFORE THE IACHR<sup>4</sup>**

<b>Filing of the petition:</b>	April 21, 2011
<b>Notification of the petition to the State:</b>	November 17, 2015
<b>State's first response:</b>	April 12, 2016
<b>Additional observations from the petitioner:</b>	January 25, 2019
<b>Additional observations from the State:</b>	May 16, 2019

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (instrument adopted September 25, 1992) and Inter-American Convention to Prevent and Punish Torture (instrument deposited on July 20, 1989)

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

<b>Duplication of procedures and international <i>res judicata</i>:</b>	No
<b>Rights declared admissible</b>	Articles 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (judicial guarantees), 11 (protection of honor and dignity), 13 (freedom of thought and expression), and 25 (judicial protection), all related to Articles 1(1) (obligation to respect the rights) and 2 (obligation to adopt provisions of domestic law) of the American Convention on Human Rights; and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture

<sup>1</sup> The other alleged victims are: Maria do Carmo Nascimento Silva, Diana Maria da Silva, Carlos Eduardo da Silva, Damiana do Nascimento de Souza, Maria Aparecida Nascimento de Souza, Crislane da Silva Santos, Raiane da Silva Santos, Taciane da Silva Santos, and Ruan da Silva Santos.

<sup>2</sup> 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 concerning this matter.

<sup>3</sup> Hereinafter "American Convention" or "Convention."

<sup>4</sup> The observations submitted by each party were duly transmitted to the opposing party.

<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, applying the exception provided for at Article 46(2)(c) of the Convention
<b>Timeliness of the petition:</b>	Yes, in the terms of section VI

## V. FACTS ALLEGED

1. The non-governmental organization Justiça Global (hereinafter “petitioner”) alleges that José Carlos da Silva (hereinafter “Sr. Silva” or “the alleged victim”), an Afro-descendant, was being held in pretrial detention as of April 2006 at the Casa de Custódia Pedro Melo detention center, located in the Gericinó Prison Complex (formerly the Bangu Prison Complex: Complexo Penitenciário de Bangu) in Rio de Janeiro.

2. The family of the alleged victim was said to have been prohibited from visiting him and then received letters from him with allegations of torture and mistreatment perpetrated by prison agents. The petitioner alleges that Mr. Silva sent approximately 10 letters to his family members asking for food, clothes, and personal hygiene products, in addition to reiterating his reports of beatings and asking that someone from his family visit him. The petitioner argues that his family members had attempted to visit him on various occasions; however, each time they were kept from doing so by the administration of the detention center based on the argument that it was necessary to have a visitor’s credential. The alleged victim’s mother, Maria do Carmo Nascimento Silva (hereinafter “Ms. Silva”), was not scheduled for a visit until August 14, 2006. That same day when she went to visit her son, however, she was informed that he was no longer at the Casa de Custódia Pedro Melo detention center, but rather was being held at the Fábio Soares Maciel Prison Hospital. She immediately went to the hospital and it was only then that she was informed that her son had been admitted on July 23, 2006 and had died the next day, July 24, 2006. The petitioner notes that in the first week of August 2006 Ms. Silva had tried once again to visit her son in prison, yet at no time was she told that he had died. Indeed, the family members were not informed of the decision to transfer him to the hospital, nor of his death, until more than 20 days after the fact.

3. On August 14, 2006, Ms. Silva went to the Institute of Forensic Medicine (hereinafter IML: Instituto Médico Legal) and there she was told that her son had been buried as an indigent at the Santa Cruz Cemetery on August 7, 2006; she was given information regarding the grave where his body would be. However, the next day, August 15, 2006, she returned to the IML and was informed that the body of the alleged victim had not been buried, but was still at the Institute facilities. Ms. Silva’s niece, Maria Aparecida Nascimento de Souza, was the one who recognized the disfigured and by then decomposing body of her uncle, which had not been kept refrigerated. The alleged victim’s family did not receive authorization for his burial until September 6, 2006; the authorization was ordered by the judge of the 14<sup>th</sup> District for Natural Persons of the District of Rio de Janeiro. The autopsy report issued by the IML indicated as the cause of death cranioencephalic trauma, subdural hematoma, cerebral edema, and fatal lesions caused by a blunt instrument.

4. On several occasions in 2006 the petitioner and Ms. Silva sent formal communications to several authorities, including the Secretariat for Public Security of the State of Rio de Janeiro, Secretariat for Human Rights of the Presidency of the Republic, the Secretariat of State for the Prison Administration of Rio de Janeiro, Office of the Coordinator for Human Rights of the Office of Public Prosecutor of Rio de Janeiro (MP/RJ), Office of the Chief of the Civilian Police of the State of Rio de Janeiro, Office of Internal Affairs of the Civilian Police, Secretariat for Human Rights of the State of Rio de Janeiro, office of the director of the IML, office of the director of the National Prison Department, and Office of the Ombudsperson for the Prison System. In those communications they requested a copy of the autopsy report, an investigation to determine the responsibility of the agents involved in the torture and the omission in relation to the death of the alleged victim, and in the negligent procedures followed by the IML in relation to his body. The petitioner asserts that various responses were received from the authorities that they allege to be untrue, such as that the alleged victim died at the hospital, that his body was not buried due to the lack of interest of the family in identifying him, and that the cause of death was a cerebral aneurism, even after the autopsy report had certified lesions that resulted from torture.

5. The petitioner and Mr. Silva's family sought legal assistance from the Human Rights Office (Núcleo de Direitos Humanos) of the Office of the Public Defender of the State of Rio de Janeiro (DPE/RJ). In 2008, they allege, it was finally possible, through a public defender, to locate the existence of Incident Record No. 5662/06. With that in hand, on March 5, 2008, a copy of the file was requested. Given the lack of a response, the public defender reiterated the request and it was not until July 30, 2008, that the family members gained access to the documents related to the investigation which, at that time, were in the possession of the Office of Public Prosecutor of Rio de Janeiro due to exhaustion of the term for concluding the police inquiry. It was determined that up to that time the investigation had not begun. On July 31, 2008, the family members of the alleged victim went to the MP/SP to speak with the prosecutor handling the case, and, at that moment, she had decided to take the testimony of Maria Aparecida, the alleged victims' niece. On September 15, 2008, the prosecutor informed the petitioner and the family members that the investigations had not begun. The prosecutor is said to have then returned the police inquiry to the local police to continue the investigations, yet the deadline passed once again without any investigative step having been taken. On January 23, 2009, the delegate sought a 90-day renewal and, once again, on October 22, 2009. The petitioner alleges that on May 14, 2010, along with Ms. Silva, it went to the police unit in charge of the police inquiry and verified the inertia of the authorities when it came to continuing the investigations. It was not until that moment that the statement was taken from the alleged victim's mother. It alleges that the new 90-day period authorized by the prosecutor elapsed without any steps being taken in the investigation. As of the last time there was a consultation on the matter, on April 12, 2011, no steps had been taken by the State to investigate.

6. In tandem with the police investigation the petitioner affirms that a civil action for material and moral damages was brought against the state of Rio de Janeiro, filed in September 2008 by Ms. Silva, through the Human Rights Office (Núcleo de Direitos Humanos) of the Office of the Public Defender of the State of Rio de Janeiro. Petitioner reports that on October 28, 2009, the State offered an answer, denying the causal nexus between the action of its agents and the harm suffered by the alleged victim's mother. Its argues that the matter has been at a standstill ever since.

7. The State, however, states that the petitioner has not presented evidence that the persons responsible for the alleged victim's death are, in fact, state agents. In the State's view, one cannot, therefore, make out the crime of torture due to the lack of evidence that characterizes the active agent required by the criminal statute on torture, nor is there a causal nexus between the alleged victim's death and mass incarceration, the routine use of pretrial detention, and the need to strengthen the public defender's offices, as argued by the petitioner. As regards Mr. Silva's family's claim for economic reparation, the State argues that domestic remedies have yet to be exhausted, mindful that a civil action for compensation does not depend on the conclusion of criminal investigations and proceedings.

8. In addition, the State argues that the Commission is not competent *ratione materiae* in relation to the alleged violations of the Inter-American Convention to Prevent and Punish Torture. It emphasizes that even though it may have been obligated to adopt effective measures to prevent and punish torture in keeping with Article 1 of that treaty, Brazil only recognized the competence of the organs of the inter-American system in relation to the American Convention. However, it argues that some of the claims presented by the petitioner related to guarantees of non-repetition should be considered respecting the margin of discretion enjoyed by the competent national authorities when it comes to designing public policies. The State also reports that several of the demands presented by the petitioner have already been incorporated into public policy, such as custody hearings (*as audiências de custódia*) and the National System to Prevent and Combat Torture.

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

9. As regards the investigation into the facts and the civil action, the petitioner argues for applying the exception to the exhaustion of domestic remedies provided for at Article 46(2)(c) of the American Convention, mindful that five years have elapsed since the underlying facts, reflecting the total inertia of the State in the investigations and in pursuing the civil action. Moreover, the petitioner argues that the petition was timely filed, mindful that the investigation, at the time the petition was filed with the IACHR, had come to a standstill. The State, on the other hand, argues that the six-month time limit provided for at Article 46(1)(b) of

the American Convention was not observed, as the petitioner took four years and ten months counted from the date of the underlying facts to file the petition with the Commission. In addition, it argues that domestic remedies were not exhausted in relation to the civil action for compensation, considering that that action was filed by the Office of the Public Defender of the State of Rio de Janeiro, which proves that Brazilian law guarantees adequate and effective domestic remedies for obtaining monetary reparation in matters such as the instant case.

10. As regards exhaustion of domestic remedies, the Commission observes that the allegations of torture were made known to the authorities and that to this day the investigations were never initiated. Accordingly, the Commission concludes that the exception to the exhaustion of domestic remedies rule provided for at Article 46(2)(c) of the Convention applies in this case.<sup>5</sup> Regarding the timeliness of the petition, the Commission finds that even though the facts occurred in 2006 and the petition was received in 2011, some of their effects, such as the failure to investigate to determine who was responsible for the alleged victim's death and the unwarranted delay in the civil action, extend to the present moment. Therefore, mindful of the context and the characteristics of the facts narrated in this report, the Commission considers that the petition was filed in a reasonable time in the terms of Article 32(2) of its Rules of Procedure, in keeping with Article 46(2) of the American Convention.<sup>6</sup> Finally, as regards the civil action, the Commission reiterates that in cases such as the instant one it is not necessary to exhaust a civil action before setting the inter-American system in motion, mindful that this remedy would not respond to the petitioner's principal claim in the petition, i.e. the allegations of torture and the failure to investigate and prosecute the person or persons responsible.<sup>7</sup>

## VII. ANALYSIS OF COLORABLE CLAIM

11. The Commission considers this petition includes allegations of acts whereby José Carlos da Silva suffered torture and homicide while being held in pretrial detention by the State at the Casa de Custódia Pedro Melo detention center, located in the Bangu Prison Complex (Complexo Penitenciário de Bangu), and the failure to investigate these acts. In addition, the petition refers to the violations committed against his family members, who were kept from having contact with him while he was locked up, who did not receive information on the decision to transfer him to the hospital, were not informed of his death, and received no compensation from the Brazilian State.

12. Initially, the IACHR notes that as regards competence *ratione materiae*, in many cases it has insisted, when appropriate, to apply Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture to establish the failure to investigate acts of torture. In that context, both the Commission and the Inter-American Court of Human Rights found violations of those provisions, understanding that Article 8(3) of that treaty incorporates a general jurisdictional clause accepted by the states upon ratifying or acceding to that instrument.<sup>8</sup>

13. Mindful of these considerations and after examining the elements of acts and law set forth by the Parties, the Commission considers that the petitioner's allegations are not manifestly groundless and require a study on the merits, for the facts alleged, if corroborated as certain, tend to establish violations of the rights protected by Articles 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (judicial guarantees), 11 (protection of honor and dignity), 13 (freedom of thought and expression), and 25 (judicial protection), all in relation to 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.

<sup>5</sup> IACHR, Report No. 166/17. Admissibility. Fausto Soto Miller. Mexico. December 1, 2017, para. 11.

<sup>6</sup> IACHR, Report No. 105/17. Petition 798-07. Admissibility. David Valderrama Opazo et al. Chile. September 7, 2017, para. 12.

<sup>7</sup> IACHR, Report No 78/16, Petition 1170-09. Admissibility. Almir Muniz Da Silva. Brazil. December 30, 2016, para. 32.

<sup>8</sup> I/A Court HR. Case of Favela Nova Brasília v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 16, 2017. Series C No. 333, para. 61. See, *mutatis mutandis*: I/A Court HR. The "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63.

## VIII. DECISION

1. To find the instant petition admissible in relation to Articles 4, 5, 7, 8, 11, 13 and 25, all in conjunction with Articles 1(1) and 2 of the American Convention, as well as 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 25<sup>th</sup> day of the month of April, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Julissa Mantilla Falcón, and Stuardo Ralón Orellana, Commissioners.