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Title/Style of Cause:	Adolescents in the Custody of the Febem v. Brazil
Doc. Type:	Decision
Decided by:	President: Juan Mendez; First Vice-President: Marta Altolaguirre; Commissioners: Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts.
Dated:	9 October 2002
Citation:	Adolescents in the Custody of the Febem v. Brazil, Petition 12.328, Inter-Am. C.H.R., Report No. 39/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)
Represented by:	APPLICANT: the Center for Justice and International Law

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I. SUMMARY

1. On September 5, 2000, the Center for Justice and International Law (CEJIL) filed a petition against the Federative Republic of Brazil (hereinafter "Brazil," "the State," or "the Brazilian State") before the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR"). That petition alleged violations of Articles 4, 5, 19, 8, and 25 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), on the right to life, the right to humane treatment, the right to special protection for children, the right to a fair trial, and the right to judicial protection, all in relation to Article 1(1) of the American Convention, as well as violations of Article 13 of the Protocol of San Salvador, on the right to education, to the detriment of the adolescents accused of committing criminal offenses in the custody of the units of the Fundação do Bem Estar do Menor (hereinafter "FEBEM," the Foundation for the Well-Being of Minors) in the state of São Paulo.

2. The petitioner alleged violations by the Brazilian State because of the conditions in which the adolescents incarcerated in the São Paulo prison system are held, and the violation of their rights, as they systematically become victims of torture, maltreatment, and beatings. In addition, the degrading situation to which they have been exposed has caused several internal fights, rebellions, and attempted escapes, which often ended violently, with grievous bodily injuries and even the death of two adolescents held there.

3. The State was silent in response to the allegations of torture and maltreatment, and as regards the deaths of adolescents, mentioned in the complaint brief, arguing only that "the gloomy conditions alleged cannot be attributed to the negligence of the Government of Brazil, through its Judiciary, as the Federal Constitution of Brazil establishes judicial remedies aimed at ensuring the right to a full defense and due process of law." It adduced that the state of São Paulo

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began the process of transition from the FEBEM and submitted copies of projects which, it reported, are being developed in FEBEM.

4. The Commission, pursuant to Articles 46 and 47 of the Convention, found the petition admissible with respect to possible violations of Articles 1, 4, 5, 8, 19, and 25 of the Convention and Article 13 of the Protocol of San Salvador.

II. PROCESSING BEFORE THE COMMISSION

5. On October 10, 2000, the Commission sent a letter to the State informing it that the case had been opened, and at the same time giving the State 90 days to send information it deemed pertinent to the case, all in keeping with the Commission's Regulations in force at that time. On October 26, the State forwarded a communication in which it asked that the 90-day period be counted from October 19, the date the note was received by the Permanent Mission of Brazil to the OAS; this request was granted by the Commission on November 1, 2000. On January 19, 2001, the State requested that parts of the petition that were not clear be re-sent, and it requested an extension of the period for an additional 90 days. On January 23, 2001, the Commission sent a note informing the State that it was granting the 90 days sought. On February 27, the Commission received a note from the State to which was attached a copy of official note GS No. 019/2001, from the Secretary for Social Assistance and Development of the State of São Paulo providing clarifications on the complaint submitted by petitioner. On March 15, 2001, the Commission sent a note to the petitioner requesting its observations on the State's response within 45 days. On April 30, 2001, the petitioner requested an extension of that period. On May 2, the Commission extended the term for another 45 days. On June 18, 2001, the petitioner submitted its observations by fax. On June 20, the Commission received the original version of those observations, and on June 27 it received attachments. On July 16, 2001, the Commission granted the State 45 days to respond to the petitioners' arguments, yet to date it has not presented any further information.

III. THE POSITIONS OF THE PARTIES

A. The petitioner's position

6. The petitioner alleged that the Brazilian State violated and continues to violate several rights established in the American Convention and the Protocol of San Salvador, with respect to the adolescents in custody at the units of the FEBEM in the state of São Paulo. In its complaint, petitioner alleged violations of the rights of said adolescents at the following units: Complexo Imigrantes, Centro de Observação Criminológica-COC, Cadeião de Santo André, Complexo Tatuapé, Unidade de Referência Terapêutica-CT, Cadeião de Pinheiros, Penitenciária de Parelheiros, Franco da Rocha, and Unidade de Atendimento Inicial-UAI.

7. The petitioner denounced that the adolescents in custody at the FEBEM units are kept in overcrowded and insalubrious cells, without dividing them by age, physical development, or seriousness of the criminal offense committed. In those cells, they are forced to sleep on the floor or to share the same mattress with other adolescents. They do not have sheets or adequate clothes. During the day, they are forced to remain sitting in the cells, unable to get up or move

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about, showing the prison-type confinement to which they were subjected. In addition, they do not have any medical care, education, psychological care, or leisure time.

8. The petitioner indicated that the FEBEM units do not meet the requirements established by the Statute on Children and Adolescents, Law 8,069/90, which regulates the legal system for the protection of children and adolescents in Brazil. The structure of the units is similar to the prisons for adults. The structures are poorly maintained, with insufficient water supply, sanitary facilities, and electricity. The food served the adolescents is not prepared amidst adequate hygienic conditions.

9. The petitioner alleged that at the Complexo do Imigrantes, the judicial inspection performed in August 1999 found "overcrowding of the facility, which, with a capacity of 320 adolescents, housed some 1,400; in the physical space of each room (which ranges from 8 to 9 meters), approximately 12 adolescents slept, piled on top of one another." At that same time, the health surveillance team did not find any sheets or blankets or towels, and noted that the adolescents did not consume filtered water, a privilege accorded to the monitors. The epidemiological team presented a report setting forth the reasons for the grave situation in that unit, warning of the risk of infectious skin diseases.

10. The Center for Criminological Observation, according to the petitioner, was a unit linked to the Carandirú Complex, a penitentiary for adults, and was the subject of two petitions, by the Public Ministry, which demanded that the adolescents be transferred to another unit, since that one did not meet the requirements of the Statute on Children and Adolescents.

11. The petitioner indicated that the Cadeião de Santo André was visited by members of the Public Ministry, specialists, and attorneys in December 1999, who concluded that it was completely inappropriate for holding adolescents. In April 2000, a judicial team made another visit to that unit, and also found "that the dynamic is absolutely perverse, contributing to the growing instability observed," and that it was "inadequate for housing any living being." On that visit, they confirmed the existence of "security cells."

12. The petitioner argued that in visits to the Franco da Rocha unit in July 2000, the judicial authorities found that the adolescents remained several days locked in solitary confinement, with no medical or psychosocial care, without any educational or cultural activities. The petitioner cited a report by the United Nations Special Rapporteur on Torture, after visiting this unit, which also described the grave situation and risks at this unit.

13. The petitioner indicated that the Tatuapé Complex also received several inspection visits. According to a report by the Human Rights Caravan of the Chamber of Deputies, the building's electrical, water supply, and sanitary infrastructure was compromised; the adolescents were kept in cells with sealed windows and spent most of their time idle in a yard. Some had serious health problems, and almost all of them had skin diseases.

14. The petitioner also alleged that the youths had been tortured. Attached to this complaint were several sworn statements by adolescents who were tortured, reports by the UN Rapporteur on Torture and by the Committee on Human Rights of the Chamber of Deputies, reports on the

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epidemiological situation, on the sanitary situation, statements by the adolescents, and even exams of the corpus delicto, according to which the violations alleged were systematic and perpetrated by FEBEM employees. Notwithstanding the abundant evidence, the petitioners alleged that the judiciary had been ineffective in resolving the problems described.

15. According to the petitioner, in August 1999, at the Complexo Imigrantes unit, there was a rebellion in which 50 adolescents held there escaped, and 69 were wounded. At that time, the Public Ministry of São Paulo took statements from the adolescents who were wounded, among them Márcio de Souza, Fábio da Silva Biller, Leandro Venâncio Garcia, Diego Briessa Rodrigues Soares, Wellington Barbosa Sandoval, Renato Campos Carneiro da Silva, Reinaldo Zanotti, and Francisco Pereira, in which they recounted that after the incident, "after being stripped, they were subjected to beatings and intense physical and moral suffering" by the employees of that unit. In addition, according to the Judicial Inspection Report, some 70 adolescents reported that in the days leading up to the rebellion they were assaulted by FEBEM staff with wooden, iron, and rubber objects, and in effect several adolescents showed signs of bodily injuries. In that same unit, in October 1999, the most violent rebellion at a FEBEM center occurred, in which 300 of the youths held escaped, 59 were wounded, and four adolescents were barbarically murdered, as will be mentioned below.

16. According to the petitioner, at the Cadeião de Santo André unit, the adolescents sent there from the Complexo Imigrantes were tortured upon their arrival by the staff. In a petition by the Public Ministry in December 1999, this episode was narrated, and it was noted that there were 90 reports from the examination of the corpus delicto that substantiated those assaults. The complaints corresponding to adolescents Alexandre de Oliveira, Anderson Ferreira Rodriguez, Thiago dos Santos Godoy, and Celso Olimpo, among the victims of those acts of torture, were attached.

17. According to the petitioner, at the Cadeião de Pinheiros unit, it was found in November 1999, after a visit by the Office of the Public Prosecutor (Promotoria) and medical examiners that several adolescents had been beaten. They reported that on November 15, the monitors invaded their cells and beat them with pieces of wood and iron. At the time, the sworn statements were taken, and examinations of the corpus delicto were carried out with respect to adolescents Adriano Silva Lima, Marcelo Dutra Damaceno, Wendel Rodrigo Felix, Fernando Alves dos Anjos, Marcelo Gomes de Lima, and Jeferson Luis Vicente da Silva. In a visit in January 2000, the public prosecutors took statements from several adolescents who suffered bodily injuries from the beatings, including Cicero Esmerio Bezerra Sales, Rodrigo Luiz Ferrari, and Francisco David Alves da Silva.

18. The petitioner alleged in his petition that the Public Ministry of the state of São Paulo tried through persuasion to turn around the situation of abuse and neglect suffered by the adolescents, when on innumerable occasions it instituted administrative proceedings requesting preliminary injunctions, and twice lodged a public civil action. In addition, the judges of first instance of the Tribunal de Justiça of São Paulo ruled favorably on those motions several times, and ordered the closure of the FEBEM correctional units. Nonetheless, the Tribunal de Justiça for the state of São Paulo overturned all the preliminary injunctions, and the state's attorney (Procuradoria) answered, filing the public civil actions of 1992 and 2000, which are presently

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awaiting judgments in the Superior Tribunal de Justiça (STJ) and the Supremo Tribunal Federal (STF), respectively, where they are at a standstill. This is the basis for the petitioners' arguments that domestic remedies were ineffective for ensuring protection for the rights of the adolescents in the FEBEM facilities.

19. According to the petitioner, all the factors mentioned above "lead to a situation of instability and widespread fear, which have resulted in a large number of revolts, escapes, and internal fights," which caused the barbaric death of four adolescents in October 1999 at the Complexo Imigrantes, América Nonato de Oliveira, Adriano Dias Brandão, Robson Sena Anastácio, and another youth who was never identified, as he was decapitated, a lower limb was severed, and his body was badly burnt. That same month, adolescent Reginaldo Martins dos Santos was killed by a gunshot wound fired by another adolescent, at the FEBEM unit in Ribeirão Preto. In December 1999, at the Cadeião de Santo André, adolescent George Rodrigues Ferreira was brutally assassinated by other adolescents held there, stabbed repeatedly with a stiletto, and after being hung from a grate, a lance was run through his chest.

20. According to the petitioner, "on keeping the adolescents under its custody in sub-human conditions, which foreseeably caused revolts and internal violence, and on not offering adequate safety conditions to those minors, the State became responsible for the deaths that occurred as a result of those rebellions in several FEBEM/São Paulo units."

21. The petitioner considered that the Brazilian State violated the American Convention at Articles 4 (right to life), 5 (right to humane treatment), 19 (right to special protection for children, interpreted in light of Articles 3(1), 3(3), 19(1), 25, 37 (b), (c), and (d), and 40(1) of the Convention on the Rights of the Child of the United Nations), 8 (right to a fair trial), and 25 (right to judicial protection); and the Protocol of San Salvador, at Article 13 (right to education), all in relation to Article 1(1) of the American Convention.

B. The State's position

22. In its answer dated February 27, 2001, the State attached an official note by the Secretary for Social Assistance and Development of São Paulo, providing clarifications on the complaint, and at the same time attaching descriptions of several projects which, he argued, were being developed in FEBEM.

23. The State, in its answer, said that the petitioner's allegations are not true insofar as the projects, descriptions of which were attached, show the change in the attention the youths receive at FEBEM. It also affirmed that the State cannot be held responsible for the delays in the judicial branch, as judicial remedies are available in the judicial system that provide ample guarantees of the right to defense and due process of law for any physical or juridical person.

24. Moreover, the State denied that the situations of maltreatment reflected a pattern at the FEBEM, and asserted that FEBEM enjoys exemplary "intra- and inter-personal" relationships, based on socio-educational, cultural, and leisure activities, and that its staff members perform their functions zealously. It added that it is for the Public Ministry to identify and prosecute staff

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members accused of torture and maltreatment, and for the judicial branch to enforce the applicable sanctions.

25. The State reported that it proceeded to "dismiss 553 staff members who were inadequate or because of their involvement in maltreatment"; it hired, through a public competitive hiring process, 112 protective agents; opened inquiries to investigate the cases of maltreatment, revolts and rebellions, to determine the facts.

26. The State also indicated, with respect to a series of measures adopted with a "new management model for the social team, as well as the implementation of a socio-educational intervention that guarantees the fundamental rights of the adolescent." In addition, according to the State, since 1999, new units have been inaugurated; a quality control program was created; a special justice system (Ouvidoria) was created to serve adolescents, their family members, and staff; courses were put in place to train and re-train staff; 1,750 staff were hired through public competitive hiring processes, including physicians, psychologists, social workers, educators, teachers, and protection agents. It also reports that FEBEM has a factory to make bowls, where the adolescents are paid per unit manufactured; and in addition, the Council of Representative of the Units was established, made up of adolescents, family members, staff, representatives of the municipal government, and representatives of organizations of society at large.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence ratione personae, ratione materiae, ratione temporis and ratione loci

27. In keeping with Article 44 of the American Convention and Article 23 of the Rules of Procedure, the petitioner, as a legally-recognized non-governmental organization, has standing to present petitions to the Commission referring to alleged violations of the rights established in the American Convention. As for the State, Brazil is a party to the American Convention. The petitioners noted as the alleged victims the adolescents under the custody of the Fundação do Bem Estar do Menor (FEBEM) of the state of São Paulo, who the Commission considers can be specifically identified in due course,[FN1] with respect to whom the Brazilian State undertook to respect and ensure the rights set forth in the Convention. Accordingly, the Commission is competent ratione personae to examine the complaint.

[FN1] When the merits of the instant case are analyzed, the petitioner, with the collaboration of the State, must identify the adolescents in custody at the FEBEM units, in keeping with the understanding of the Inter-American Court of Human Rights, published in the Panchito López Case. (I/A Court H.R., Resolution of .June., 2002).

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28. The Commission is competent ratione materiae as violations have been alleged of human rights protected by the American Convention. Moreover, pursuant to Article 19(6) of the Protocol of San Salvador, the IACHR is competent to analyze facts arising from violations of Article 13 that same instrument.

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29. The Commission is competent ratione temporis insofar as the facts are alleged to have occurred when the obligation to respect and ensure the rights established in the Convention had already entered into force for the State, as it ratified the American Convention on September 25, 1992. As regards the obligations stemming from the Protocol of San Salvador, the Commission is competent because Brazil ratified it on August 21, 1996, and it entered into force on November 16, 1999.

30. The Commission is competent ratione loci because the facts alleged occurred in the state of São Paulo, in the Federative Republic of Brazil, which ratified the American Convention.

B. Admissibility Requirements under Article 46 of the American Convention

a. Exhaustion of domestic remedies

31. The exhaustion of domestic remedies is an admissibility requirement that the Commission must consider when analyzing whether a complaint is admissible. In the complaint brief, the petitioner exhaustively listed all the legal remedies used by the Public Ministry of the state of São Paulo, which had the duty to protect the rights of the children and adolescents of that state, to see to it that the alleged violations to which the adolescents in the custody of the FEBEM were subjected be brought to a halt.

32. The Public Ministry filed a public civil action in 1992 on behalf of the adolescents in custody at the Complexo Imigrantes of the FEBEM, setting forth all the irregularities at that unit, which endangered the life and physical integrity of those adolescents. In August 1995, a judgment in the first instance was proffered, ordering FEBEM to "promote reforms to cure the very grave irregularities found (lack of medical and psychosocial care, poor hygienic and sanitary conditions, poor living conditions, overcrowding, etc.)," within 90 days. In 1997, the Tribunal de Justiça of São Paulo affirmed that decision. The FEBEM filed a special and extraordinary appeal to amend the judgment, which, according to the information provided by the petitioner, is awaiting a ruling before the Superior Tribunal de Justiça and the Supremo Tribunal Federal. In 2000, the second public civil action was filed on behalf of the adolescents in the custody of the FEBEM. According to the petitioners, that action was at a standstill, awaiting a possible settlement offer.

33. In 2000, the Public Ministry once again instituted a public civil action to stop the transfer of adolescents to the Palheiros prison, which is inadequate for the purpose to which it had been earmarked, according to the report by the judge's technical team. A preliminary injunction was granted in April 2000, but was suspended the following month. The adolescents were transferred, and, according to the petitioner, continue to be held at that prison as of the date that action was instituted. The action is currently at a standstill.

34. In addition, the Public Ministry had instituted eight administrative proceedings before the courts with motions for preliminary injunctions as of the year 2000.

Administrative Proceeding 13/99, opened August 30, 1999, on the situation at the Complexo Imigrantes;

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Administrative Proceeding 15/99, opened October 27, 1999, on the situation of the minors held at the Centro de Observação Criminológica (COC), of the Complexo do Carandirú;
Administrative Proceeding 20/99, opened December 17, 1999, to investigate irregularities at the Cadeião de Santo André;
Administrative Proceeding 21/99, opened December 21, 1999, to investigate irregularities at the Cadeião de Pinheiros;
Administrative Proceeding 02/00, opened February 20, 2000, to investigate irregularities at the Unidade de Referência Terapêutica - UTR, at the Complexo de Tatuapé;
Administrative Proceeding 06/00, opened in February 2000, to investigate irregularities at Franco da Rocha;
Administrative Proceeding 11/00, opened in August 2000, to investigate irregularities at Franco da Rocha.
Administrative Proceeding 17/00, to investigate irregularities at the Unidade de Atendimento Inicial - UAI.

35. According to the petitioners, the preliminary injunctions sought were aimed at curing the irregularities reported in the FEBEM units, such as overcrowding, unhygienic conditions, medical and psychological care, educational services, vocational training, and physical activities, keeping adolescents of different ages, physical development, and degrees of dangerousness together; and bringing the treatment accorded the adolescents into line with the requirements of domestic and international legislation, in order to avoid internal conflicts, violent rebellions, and escapes, which endangered the lives and physical integrity of the adolescents in custody. In these proceedings, the judges of first instance issued the preliminary injunctions, which were later struck down by the Tribunal de Justiça for the state of São Paulo; as of the year 2000 none of these proceedings had resulted in a final decision.

36. The petitioner further adduced that “the domestic remedies proved ineffective for guaranteeing the protection of the adolescents’ rights in a prompt and effective manner. There is a demonstrated pattern of the Tribunal de Justiça overturning all the preliminary injunctions granted in the first instance to regularize the situation of the adolescents, based on the argument of “public safety.”

37. The IACHR notes that during the time from the first public civil action in 1992 and the filing of the instant petition, formally lodged in 2000, several rebellions and escapes have ensued, with the death of 6 (six) youths, which shows the ineffectiveness of the domestic remedies.

38. Initially, it should be noted, the Brazilian State, on the occasions it had to state its position on the complaint that is the subject of this report, did not set forth the preliminary objection of failure to exhaust domestic remedies, in opposing the admissibility of the petition. Rather, it was silent; accordingly, one can presume that it tacitly waived the objection of failure to exhaust domestic remedies.

39. In this respect, the Inter-American Court has noted that “the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings

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by the State entitled to make it, lest a waiver of the requirement be presumed."[FN2] Accordingly, the IACHR concludes that the State tacitly waived this requirement.

[FN2] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987, para. 88.

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b. Time period for submission

40. In the petition under study, the Commission determined that the Brazilian State tacitly waived its right to invoke the objection of failure to exhaust domestic remedies. As the Convention requirements of exhaustion of domestic remedies and submission within six months of the judgment that exhausts domestic remedies are independent, the Inter-American Commission must determine whether the petition under study was submitted within a reasonable time. This is because, as it has been established that the State tacitly waived the requirement of prior exhaustion of domestic remedies, there is no date certain from which to count the six-month period. The lack of a date certain does not relieve the petitioner of the requirement of timely submission. In this regard, the Commission, considering the particular circumstances of this petition, considers that this complaint was submitted within a reasonable time.

c. Duplication of procedures and res judicata

41. The Commission does not note from the record that the complaint brought before it is pending before another international procedure and did not receive any information that indicates such a situation. Nor does it appear to reproduce a petition or communication previously examined by the IACHR. Accordingly, the Commission understands that the requirements of Articles 46(c) and 47(d) of the Convention have been met.

d. Characterization of the violations

43. The Commission considers that prima facie the facts alleged by the petitioner may come to characterize a violation of Articles 1(1), 4, 5, 19, 8, and 25 of the American Convention, and Article 13 of the Protocol of San Salvador, for possible violations of the rights to life, humane treatment, and personal liberty, as well as the rights to a fair trial, to judicial protection, and to education of the adolescents in the custody of the FEBEM units in São Paulo.

V. CONCLUSION

44. The Commission concluded that it is competent to take cognizance of this petition, and that it meets the requirements of admissibility, pursuant to Articles 46 and 47 of the American Convention.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

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1. To declare, without pre-judging on the merits of this complaint, that this petition is admissible in relation to the facts alleged and with respect to Articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), 19 (right to special protection for children), and 25 (right to judicial protection), in conjunction with Article 1(1) (obligation to respect the rights contained in the Convention); and Article 13 of the Protocol of San Salvador (right to education).
2. To transmit this report to the State and the petitioner.
3. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., the 9th day of October 2002. (Signed): Juan Méndez; President, Marta Altolaguirre; First Vice-President, Robert K. Goldman, Julio Prado Vallejo, and Clare K. Roberts, Commission members.