

Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 18/07; Petition 12.479
Session: Hundred Twenty-Seventh Session (26 February – 9 March 2007)
Title/Style of Cause: Jose Airton Honorato, Jose Maria Menezes, Aleksandro de Oliveira Araujo, Djalma Fernandes Andrade de Souza, Fabio Fernandes Andrade de Souza, Gerson Machado da Silva, Jeferson Leandro Andrade, Jose Cicero Pereira dos Santos, Laercio Antonio Luis, Luciano da Silva Barbosa, Sandro Rogerio da Silva and Silvio Bernardino do Carmo v. Brazil
Doc. Type: Decision
Decided by: President: Florentin Melendez;
First Vice-President: Paolo Carozza;
Commissioners: Clare K. Roberts, Freddy Gutierrez, Evelio Fernandez Arevalos.
In keeping with Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Paulo Sergio Pinheiro, a Brazilian national, did not participate in the decision on this petition.
Dated: 3 March 2007
Citation: Airton Honorato v. Brazil, Petition 12.479, Inter-Am. C.H.R., Report No. 18/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007)
Represented by: APPLICANT: Helio Bicudo
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I. SUMMARY

1. On April 24, 2003, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") received a petition submitted by the Federação Interamericana de Direitos Humanos (Inter-American Federation for Human Rights), represented by its president, Hélio Bicudo (hereinafter "the petitioner"), alleging a violation by the Federative Republic of Brazil (hereinafter "Brazil" or "the State") of Articles 1, 4, 5, 6, and 8 of the American Convention on Human Rights (hereinafter "the American Convention"), to the detriment of José Airton Honorato, José Maria Menezes, Aleksandro de Oliveira Araujo, Djalma Fernandes Andrade de Souza, Fabio Fernandes Andrade de Souza, Gerson Machado da Silva, Jeferson Leandro Andrade, José Cicero Pereira dos Santos, Laercio Antonio Luis, Luciano da Silva Barbosa, Sandro Rogerio da Silva and Silvio Bernardino do Carmo (hereinafter "the alleged victims").

2. The complaint concerns a series of linked events, the principal one being the murder of the alleged victims by military police on March 5, 2002. The petitioner claims that in 2001, police officers and executive and judicial authorities of São Paulo State began to recruit prisoners in the state penitentiaries to act as agents infiltrated into criminal organizations through a group

called the "Group for Suppression and Analysis of Crimes of Intolerance" (hereinafter referred to by its acronym, GRADI), for the purpose of obtaining advance knowledge of criminal actions and making it possible to arrest potential offenders before the crime was committed. In some cases, they instigated the planning and commission of punishable acts, and the perpetrators were executed by the police while carrying out the plan, as occurred in the situation that is the subject of the complaint. That situation resulted in the death of 12 (twelve) alleged members of the gang known as Primeiro Comando da Capital (First Command of the Capital) (hereinafter "PCC"), who were traveling on a bus, according to the police, with the aim of launching an attack or freeing imprisoned comrades.

3. On June 21, 2005, the State responded to the petition, objecting to the failure to exhaust domestic remedies. It claims that on the date the complaint was lodged, the indictment entered in December 2003 against 53 (fifty three) police officers and 2 (two) prisoners had been under way for slightly more than a year, a short time in which to investigate such complex and sensitive events. Domestic judicial remedies are being implemented in accordance with the complexity of the case and the opposing rights of the individuals involved, and this justifies the pace of the proceeding; accordingly, the case should be declared inadmissible.

4. After analyzing the petition, and pursuant to Articles 46 and 47 of the American Convention, as well as Article 30 and related articles of its Rules of Procedure, the Commission decided to declare the petition admissible in relation to alleged violations of Articles 4, 8(1), and 25 of the American Convention in accordance with the general obligation to respect and guarantee rights as provided in Article 1(1) of the Convention, and at the same time decided to declare the petition inadmissible in relation to the alleged violation of Articles 5 and 6 of the Convention. The Commission also decided to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States (OAS).

II. PROCESSING BY THE COMMISSION

5. The original petition was received by the Commission on April 24, 2003 and filed as P-301/03, and was subsequently designated as Case 12.479. On April 24, 2003, the Commission sent an acknowledgment of receipt of the petition to the petitioner. On October 11, 2003, the petitioner submitted additional information on the complaint. On December 22, 2003, the Commission transmitted the pertinent parts of the complaint to the State pursuant to Article 30 of its Rules of Procedure, requesting the State to respond to the petition and giving it two months in which to submit its reply. The petitioner was informed of this fact on the same date.

6. On February 24, 2005, the petitioner delivered information related to the situation. Acknowledgment of receipt of the information was sent to the petitioner on March 9, 2005. On the latter date, parts of the information submitted by the petitioner were transmitted to the State, which, who was granted a period of 2 (two) months in which to submit its observations.

7. On June 14, 2005, the State submitted a request for an extension of the time granted to it to submit observations.

8. On June 20, 2005, the State submitted the information requested.

9. On June 7, 2005, the petitioner filed a request for precautionary measures to protect the lives of prisoners Marcos Massari and Gilmar Leite Siquiera, who had disappeared.

10. On August 5, 2005, acknowledgment of receipt of the information submitted was sent to the State, and a copy thereof was transmitted to the petitioner so that it could submit whatever observations it deemed appropriate within a period of one month.

11. On September 1, 2005, the petitioner asked the Commission if the period of one month that it had been granted to submit observations on the information delivered by the State might run from its receipt of the letter dated August 5, 2005 to September 25, 2005.

12. On September 7, 2005, the petitioner was informed that, pursuant to Article 25 of the Commission's Rules of Procedure, the precautionary measures that had been requested did not meet the admissibility requirements. It was made known to the petitioner, however, that the information presented in that regard would be taken into account as additional information on the case in question. This situation was brought to the State's attention on the same date.

13. On September 22, 2005, the petitioner submitted additional observations on the information presented by the State.

14. On October 7, 2005, the additional observations submitted by the petitioner were transmitted to the State. On the same date, acknowledgment of receipt of the information submitted on September 22, 2005 was sent to the petitioner.

15. On September 6, 2006, the petitioner submitted to the Commission a request for a hearing to be held on the case during its 126th regular period of sessions. On September 19, 2006, the petitioner and the State were informed that the Commission had decided to convene a hearing on admissibility, setting the date for the hearing on October 19, 2006, from 3 p.m. to 4 p.m., and requesting a list of the persons who would participate in it.

16. On October 19, 2006, from 3 p.m. to 4 p.m., a hearing was held on the case with the participation of the petitioners and the State.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

17. The petitioners state that the case involves serious human rights violations committed by police officers and executive and judicial authorities of São Paulo State, who in 2001 began to "recruit" prisoners in the state penitentiaries to act as agents infiltrated into criminal organizations. This action was carried out by a group of military and civilian police officers, known as GRADI, in order to obtain advance knowledge of criminal actions and arrest the potential perpetrators even before the crime had taken place. In some cases, these perpetrators were executed while creating situations that simulated criminal actions, as occurred on March 5, 2002, on the outskirts of the city of Sorocaba, São Paulo State, in the area known as

"Castelinho." On this occasion, a military police operation resulted in the death of 12 (twelve) alleged members of the criminal gang PCC, who were traveling on a bus, according to the police, in order to launch an attack on a cash-transport aircraft or to rescue imprisoned comrades.[FN2] The military police action was an ambush, planned with the aid of criminals recruited in the prisons, who were coerced into acting as infiltrated agents alongside the GRADI. Their objective was to execute the passengers on the bus, eliminating allegedly dangerous members of a group linked to organized crime and thereby generating a feeling of safety within São Paulo society and restoring confidence in the police and the public safety policy, both of which had been discredited.

[FN2] A newspaper article published in the Folha de São Paulo on March 6, 2002, a copy of which is annexed to the petition, is cited in support of this statement.

18. When the agents involved in the action were publicly denounced, they sought to eliminate the prisoners who had collaborated with the GRADI, namely, Rony Clay Chaves, Rubens Leoncio Pereira, Marcos Massari, and Gilmar Leite, the last two having disappeared (they are assumed to have escaped with the collusion of prison officers). The Brazilian Government must be held responsible, since the actions described constitute violations of Articles 1, 4, 5, 6, and 8 of the American Convention. Such violations result from the use of a policing mechanism within the purview of the São Paulo State Public Safety Department, which availed itself of the prisoners, infiltrating them into criminal organizations in order to kill their members.

19. The petitioner affirms that it has exhausted domestic remedies pursuant to Article 46(1)(a) of the American Convention, since the action instituted before the Corregedoria Geral de Justiça (Office of the Court Administrator) in August 2002, asking that an investigation be launched into the criminal and administrative responsibility of the persons involved, has as yet yielded no results, and this constitutes unwarranted delay in the adoption of measures to prosecute and punish those responsible. Furthermore, the investigations into the involvement of state authorities were carried out by police officers subordinate in rank to those investigated. The judges who authorized the illegal removal of the prisoners so that they could be infiltrated into criminal groups were separated by decision of the State Court of Justice; however, the proceedings were quashed for lack of evidence by a resolution of February 16, 2005, which also affected the State Secretary of Public Safety. The latter official, under whose administration the Castelinho massacre occurred and who approved the operation, remains in office, and this constitutes flagrant disrespect for the principles of due process of law. Moreover, the proceedings are conducted in secret, which prevents their being formally monitored and jeopardizes the transparency required for the judicial machinery to operate efficiently.

20. In relation to the facts, the petitioner complains that on September 9, 2001, the then State Secretary of Public Safety created the Group for Suppression and Analysis of Crimes of Intolerance (GRADI), a group composed of civilian and military police officers that was linked directly to the Secretary's Office. The objective of this group was to receive complaints and investigate offenses committed by sectarian groups, such as fascists, neo-Nazis, or homophobes,

that involved racial, sexual, and religious discrimination, as had occurred frequently in São Paulo State. Meanwhile, notwithstanding the importance of the reasons for its creation, the São Paulo GRADI began to act in a manner that conflicted with the principles on which it was based. During the period in which it was established, urban crime rates grew at a rate that drew headlines in the major media, causing concern and insecurity in São Paulo society. The media also reported that the authorities were under pressure to find ways to contain crime and that the public safety institutions had been discredited. To respond to the demands in this area and in view of the electoral contest that would begin in the second half of 2002, the State government decided, through the Public Safety Department, to give priority to publicizing actions that would eliminate the alleged principal criminal faction that was operating in São Paulo, the PCC. This criminal group had become popularly known as the most dangerous organization linked to criminal incidents in São Paulo State by taking charge of a string of uprisings that had occurred simultaneously in 19 (nineteen) high-security prisons in the capital and areas outside it in January 2002. With the objective stated above, the GRADI began to act as a secret intelligence service for the military police; in an initial phase, it tapped the telephones of the above-mentioned faction to prevent criminal acts.

21. The petitioners maintain that the GRADI began to carry out a series of illegal practices to achieve its objective. These included recruiting prisoners in high-security prisons in the capital by promising protection for their families, graduated prison regimes, and even early release. Apart from the promises, it was not clear what the consequences of refusal would be, so the prisoners did not take the risk of not accepting the "offers." They were removed from their cells for months to be infiltrated into gangs linked to the PCC or other criminal groups and thereby provide information that would disrupt future plans. The prisoners were removed on the basis of judicial authorizations issued by administrative judges (jueces correjidores) in the high-security prisons of São Paulo, in violation of the law, which allows prisoners to leave the prison compound only for court appearances, medical treatment, or funerals of close relatives, always accompanied by an escort.

22. According to the report, once freed, these prisoners, under the leadership of the GRADI, became police informants on the activities of these groups and were provided with the requisite logistical equipment, such as vehicles and cell phones. From the beginning of their activities, this corps recruited at least five prisoners and was responsible for 22 (twenty two) deaths. Many of these cases attracted publicity; to demonstrate this, newspaper clippings are attached.[FN3] Among these situations, mention is made of the deaths of 5 (five) members of a specialized gang in Campinas, 4 (four) of whom were captured; the reports indicate that elements of the GRADI were involved. Another case put forward by the petitioner concerns the deaths of four members of the PCC and of the prisoner Fernando Rodrigues Batista, known as "the Jackal," removed by members of the GRADI and the ROTA with judicial authorization from Avaré Penitentiary. The deaths occurred following an exchange of gunfire. The petitioner maintains that there is a São Paulo police file on the activities of the GRADI that will be attached to the petition.

[FN3] Folha de São Paulo, July 27 and 28, 2002.

23. The principal case attributed to the GRADI, according to the complaint, is the massacre of 12 persons that took place in the situation brought before the Commission. On March 5, 2002, as these individuals, who had been persuaded to attempt a robbery of a cash-transport aircraft, allegedly were on their way to carry out the attack, the military police formed a ring of approximately 100 agents on the outskirts of Sorocaba, São Paulo State, and ambushed the group at a toll station located on Ruta Senador José Ermirio de Moraes, known as "Castelinho." Since the persons traveling in the vehicle allegedly resisted arrest, a shootout occurred. It is stated that over 700 bullets were fired and that only one police officer was wounded "in passing." The incident resulted in the deaths of the 12 (twelve) persons on board the vehicle, whose right to life was violated, according to the complaint in the present case.

24. According to the military police investigation, two Special Operations Command (COE) teams, 27 (twenty seven) highway military police officers, 2 (two) captains, 3 (three) lieutenants, one deputy lieutenant, 6 (six) sergeants, 2 (two) corporals, and 22 (twenty two) military police soldiers took part in the "Castelinho" operation on March 5, 2002[FN4], in addition to the GRADI team.

[FN4] Military police investigation, "Companhia de Choque," p. 156, cited by the petitioner.

25. The 12 (twelve) alleged members of the PCC who were killed in the operation could, according to the petitioners, have been arrested two days earlier in the locality of Itaquaquecetuba, at a meeting where the final details of the planned assault were discussed. Present at that meeting were 2 (two) military police officers who were members of the GRADI and a recruited prisoner who had been infiltrated into the group. All of this is set out in a military police report of March 12, 2002 that was sent to the then administrative judge of the São Paulo DIPO, Mauricio Lemos Porto Alves, who has since been separated from office by the Court of Justice on the suspicion that he took part in issuing authorizations for the removal of prisoners.[FN5]

[FN5] Information contained in Folha de São Paulo, August 15, 2002.

26. The petitioner states that the São Paulo Airway Department (DAESP) reported that no cash-transport aircraft had been received for over five years at the airport to which the alleged victims were allegedly traveling. On July 27, 2002, the newspaper Folha de São Paulo published an article that reported in detail on the action carried out at "Castelinho". That same article reported that GRADI police officers had been accused of torturing 2 (two) prisoners collaborating with the group who had been removed with judicial authorization to investigate the PCC and who were in the Criminological Observation Corps (COC). On April 1st, 2002, these prisoners escaped in a GRADI vehicle; the officers filed a report with the 85th Police Division, neglecting to state that the thieves were working for them. When the prisoners were recaptured, they were beaten severely, and the perpetrators subsequently reported that the fractures, bruises, and lacerations seen on the victims were the result of their escape.[FN6]

[FN6] Information published in Folha de São Paulo, July 27 and 28, 2002.

27. The petitioner also maintains that Dr. Nelson Massini, Full Professor of Forensic Medicine at Rio de Janeiro State University, compared the spectrographic analysis of the residue and the corpus delicti with data on the victims of the confrontation between PCC members and military police officers. The first spectrographic analysis found traces of lead on the hands of only 3 (three) of the 12 (twelve) individuals who were executed and no residue at all on the other 9 (nine). Dr. Massini stated, however, that powder residues on a person's hands do not necessarily mean that person was using a firearm at a particular time. As to the autopsy reports, his analysis found serious flaws in the techniques. In describing the wounds caused by firearm projectiles, 11 (eleven) reports did not describe the trajectories of these projectiles, and the one description given was incomplete. The victims were killed by numerous shots; one of them had 11 (eleven) bodily perforations caused by projectiles. The average was 5 (five) impacts per victim. The professor emphasized that the autopsy reports had significant flaws, mainly because of the failure to describe the trajectories of the shots. The analysis found that all of the victims had been hit by the shots at a perpendicular angle; 9 (nine) of the bodies had wounds on the upper extremities characteristic of a defensive position, according to the Forensic Medicine.

28. With regard to the exhaustion of domestic remedies, the petitioner states that on August 10, 2002, in light of the complaints made by Rony Clay Chaves, Hélio Bicudo, and Orlando Fantazzini, representing civil society organizations and legislative entities – specifically, the Centro Santos Dias de Direitos Humanos, the Teotonio Vilela Human Rights Commission, and the Human Rights Commission of the Chamber of Deputies – these entities, concerned for the safety of the prisoners whose lives were at risk, as they had reported to the executive authority of São Paulo State, filed complaints with the 3 (three) spheres of authority (Minister of Justice, State Secretary of Human Rights, Presidents of the Chamber of Deputies and the Federal Senate, President of the Legislative Assembly of São Paulo State, Chairman of the Human Rights Commission of the Legislative Assembly). The Human Rights Commission of the Chamber of Deputies requested the Federal Minister of Justice to put the federal police in charge of the investigations into the GRADI; that request was not granted.[FN7]

[FN7] Published in O Estado de São Paulo, August 10, 2002.

29. With a view to assigning responsibility to the police officers who had carried out the illegal actions, various human rights organizations, including the Brazilian Bar Association, São Paulo branch, offered to represent the petitioners before the Attorney-General's Office, the body competent to initiate the opening of an investigation into offenses committed in the criminal justice sphere. The Attorney General, Luiz Antonio Marrey, requested the Court of Justice to open an investigation to determine the involvement of the State Secretary of Public Safety, Saulo Abreu Filho, and of administrative judges Otavio Augusto Machado de Barros Filho and

Mauricio Lemos Porto Alves. This investigation was quashed by the court owing to lack of evidence.

30. The federal government did not allow the prisoners who had collaborated with the GRADI to be transferred to institutions administered by the federal government, as the petitioner and other organizations had requested on August 10, 2002,[FN8] nor did it transfer the investigations of the events to the federal police jurisdiction. The petitioner complains that there is no access to the investigation process and that it is being carried out by members of the Civil Police under the authority of the State Secretary of Public Safety. The petitioner maintains that the inadequacy of the investigations is exemplified by the delivery to the government attorneys of a completely blank videotape taken from the security cameras of the toll station where the events took place.

[FN8] The prisoners whose transfer was requested are Rony Clay Chaves, Rubens Leoncio Pereira, Marcos Massari, and Gilmar Siqueira. The latter two, according to information submitted by the petitioner on February 24, 2005, escaped from Itai prison in mid-2004 in collusion with prison authorities. According to information presented by the State at the hearing on October 19, 2006, Gilmar Leite Siqueira was recaptured and is imprisoned in Sorocaba Penitentiary II, administered by São Paulo State. Marcos Massari has evaded justice since he escaped from Itai prison on August 27, 2004 (annex 5 of the said information).

31. At the hearing on October 19, 2006, the petitioner maintained that, while there was an ongoing criminal proceeding against 53 (fifty three) military police officers and 2 (two) prisoners, it was in the investigatory phase and had many procedural phases to go through. The compensation proceedings instituted by relatives of 7 (seven) of the 12 (twelve) victims were inconclusive; only two of them had obtained a judgment, and in one of those cases, the compensation requested had been denied. There was no news, meanwhile, of the administrative proceeding to investigate the escape of prisoners Gilmar Siqueira and Marcos Massari from Itai prison in 2004.[FN9]

[FN9] In the information submitted by the petitioner on February 24, 2005, it is stated that the escape of these two individuals was carried out with the consent of the prison authorities, who facilitated it. In view of the strangeness of the event, an administrative proceeding was instituted to investigate it.

32. In conclusion, the petitioner states that domestic remedies have been exhausted in accordance with the best interpretation of Articles 46(1)(a) and 29 of the American Convention, since 3 (three) years have elapsed since actions were initiated by the Brazilian authorities without producing any results; accordingly, it requests the Commission to open the case.

B. Position of the State

33. On June 20, 2005, the State submitted observations on the petitioner's arguments as to the facts and the merits. First, it describes all the arguments outlined by the petitioner.

34. Next, the State objects to the failure to exhaust domestic remedies, stating that the criminal action instituted in December 2003 against 53 (fifty three) police officers and 2 (two) prisoners has been under way for slightly more than a year, a short time in which to investigate such complex and sensitive events, since there can be no errors in the process. Any criminal investigation or proceeding must conform to due process of law, which includes strict observance of the principles of adversary procedure and ample defense – enshrined, moreover, in Articles 8 and 25 of the American Convention – since the issue involves opposing rights. If the State were to impose an accelerated pace on the proceeding, which would conflict with the exercise of the means and remedies guaranteed to the 55 (fifty five) defendants, that might constitute a violation of the human rights of these individuals and lead to annulment of the proceeding. The jurisprudence of the Inter-American Court of Human Rights is cited as to what is considered a reasonable period.

35. It is clear, the State affirms, that in a proceeding in which 55 (fifty five) persons are accused of three counts of aggravated homicide of 12 (twelve) others, the passage of slightly more than a year and a half in a proceeding still under way is not an unwarranted delay. This factor makes the admissibility requirement relating to the non exhaustion of domestic remedies applicable. Such remedies are being implemented in accordance with the complexity of the case and the opposing rights of the individuals involved, such as personal freedom and the judicial guarantees afforded to dozens of defendants, and this justifies the delay. Accordingly, the State requests that the case be declared inadmissible.

36. The State goes on to describe all the appropriate, effective, and available remedies to which the victims are not denied access. In accordance with article 5 of the Federal Constitution, the crime of intentional homicide is governed by the procedure enacted in the Brazilian Code of Criminal Procedure (CPP), which provides for the case to be tried before a panel of judges (jurado). Pursuant to the Code, the prosecution of crimes whose examination and judgment are assigned to a panel is divided into 2 (two) phases, following the criminal investigation, which is in progress: the opinion (pronúncia) phase, and the phase of judgment by a ruling court (Tribunal do Júri). In the opinion phase, once the criminal investigation is completed, the following occurs: (a) if the judge is convinced that the crime has been committed, and convinced by *indicia* that the defendant is the perpetrator, he will issue an opinion, giving the reasons for his opinion (art. 408 CPP), to be submitted to the judgment of the ruling court; (b) if he is not convinced that the crime has been committed, or convinced by sufficient *indicia* that the defendant is the perpetrator, the judge will dismiss the complaint (art. 409 CPP). In that case, so long as punishability is not time-barred, a proceeding may be instituted against the defendant(s) at any time if new evidence emerges (art. 409, sole paragraph, CPP); (c) if the judge is convinced that a crime other than intentional homicide has been committed, and he is not competent to judge that crime, he will transfer the proceeding to a judge who is competent to judge it. Pursuant to article 410 of the CPP, the defendant is then given more time to prepare his defense and indicate witnesses; (d) in the three instances cited, if the prosecution is not satisfied with the ruling judge's decision, it may, within five days of notification of the judgment, lodge an appeal for review (*recurso em sentido estrito*) with the Court of Justice (arts. 581(IV) and 586 CPP); (e) if

the ruling judge is convinced that there are circumstances that preclude the crime or that exempt the defendant from punishment, he may automatically exonerate him, pursuant to article 411 CPP. Under this assumption, meanwhile, the Brazilian legal system itself provides for ex officio or automatic appeal to a higher court.

37. Once the case has been submitted for judgment by the ruling court, its decisions may be appealed within five days, if (art. 593(III) CPP): (a) an annulment occurs after the opinion has been issued; (b) the presiding judge's ruling is contrary to stated law or the decision of the panel members; (c) there is an error or injustice in the application of the penalty or security measure; (d) the decision of the panel members patently conflicts with the evidence on file. The State affirms that if the Public Prosecutor's Office does not appeal the judgment within the legal time limit, the victim, his spouse, child, parent, or sibling, although not authorized to attend the trial, may, pursuant to article 598 of the CPP, institute a remedy of appeal within 15 (fifteen) days following the expiration of the time limit for the Public Prosecutor's Office to file an appeal. If, while the Court of Justice is processing the remedy of appeal, assumption (a) occurs, it will annul the respective proceeding with all of its consequences, pursuant to articles 537 to 563 of the CPP; under assumptions (b) y (c), it will to proceed to make the necessary corrections; and under assumption (d), the defendant will be retried by the panel.

38. In the event that the alleged victims in the case are dissatisfied with the decision on appeal, there is still the possibility of instituting a special appeal to the Superior Court of Justice and an extraordinary appeal to the Federal Supreme Court within 15 (fifteen) days, as provided for in article 508 of the Code of Civil Procedure (CPC). The parties may submit a special appeal to the Superior Court of Justice pursuant to article 105(III)(a) and (c) of the Federal Constitution, if the decision of the State Court of Justice conflicts with any treaty or federal law (including the American Convention), or denies them standing, or interprets federal law differently than another court has. The parties may also submit an extraordinary appeal to the Federal Supreme Court, pursuant to article 102(a), if the decision of the State Court of Justice conflicts with provisions of the Federal Constitution, article 5 of which in essence restates the fundamental rights provided in the American Convention and argued by the petitioner in the present case. If, in the admissibility proceeding, the appeal court declines to grant the special appeal or the extraordinary appeal, the parties may institute an appeal against denial of judicial review (*agravo de instrumento*) within 10 (ten) days to the Superior Court of Justice or the Federal Supreme Court, respectively, in order to ensure the processing or consideration on the merits of the above-mentioned appeals, pursuant to article 544 of the CPC. The foregoing indicates that there are still a number of appropriate and effective remedies to be exhausted in the complex criminal proceeding under way concerning the Castelinho episode before the petition can be admitted by the inter-American human rights system.

39. With respect to the decision of the Special Body of the São Paulo State Court of Justice to quash the investigation into the alleged participation of Saulo de Castro Abreu Filho, Mauricio Lemos Porto Alves, and Octavio Augusto Machado, the State emphasizes that it was based on the lack of sufficient evidence to justify the opening of a criminal proceeding. According to the petitioner, this decision completely exhausted the possibility of reversing the situation of impunity with respect to these defendants. With due respect, that statement is untrue, since the said decision could have been the subject of a writ of mandate (*mandado de segurança*) against

jurisdictional action addressed to the Plenary of the São Paulo State Court of Justice, in accordance with article 5 of the Federal Constitution. If the writ of mandate is denied, an ordinary appeal may be addressed to the Superior Court of Justice, in accordance with article 105 of the Federal Constitution. The Public Prosecutor's Office, which had standing (*legitimatio ad causam*) to institute such an appeal, did not see fit to do so; this seems to indicate that it did not view the decision of the Special Body as violating any right. The decision to quash the investigation in no way exhausts the domestic remedies under way to elucidate the facts relating to the Castelinho episode, especially in view of the more than 50 defendants facing criminal proceedings related to that episode.

40. The State's representatives wish to place on record that the allegations concerning the use of prisoners as police informants, and that the escape of prisoners Marcos Massari and Gilmar Siqueira Leite from Itai Penitentiary was facilitated by São Paulo State officials, are also being investigated internally, since there are no objective factors that would warrant their examination by the Commission.

41. With regard to the alleged delay in authorizing the heir of one of the victims to attend the criminal proceeding against the 53 (fifty three) police officers, the Brazilian State observes that the petitioner did not even indicate who that heir or that victim was, to facilitate a clarification of the question. As to the actions for reparation of damage put forward by the victims of the event, their pending status constitutes no violation of any right enshrined in the American Convention, since the arguments relating to the handling of the criminal proceeding apply to them as well; a remedy of appeal against the final judgment may be addressed to the Superior Court, pursuant to articles 513 to 521 of the CPC. If the Court's decision on the appeal alters the judgment on the merits and is not unanimous, a remedy of objection to a default judgment (*embargo de divergência*) may be instituted. If the judge-rapporteur of the body to which the appeal is addressed denies the objection to a default judgment, an appeal against denial of judicial review may be lodged with a higher court within 5 (five) days. Lastly, a special appeal may be instituted before the Superior Court of Justice and an extraordinary appeal with the Federal Supreme Court, as explained above.

42. At the hearing held on October 19, 2006, the State recognized that the criminal case against 54 defendants[FN10] had been in the investigation phase since December 2003, and that up to then, only 2 (two) co-defendants who had allegedly acted as police collaborators had appeared to testify. The State argued that was due to the excessive complexity of the proceeding and the fact that the defendants were all members of the Military Police, who are constantly moved from place to place because of their duties, so that it is difficult to find them, and summoning them requires the assistance of several judges to issue the requisite documents.

[FN10] At one point in this hearing, one of the persons who was testifying for the State said that one of the defendants had died. This was placed on record with the explanation that, while the Commission knew the identity of each of the defendants in accordance with annex 1 of the information presented by the State at this hearing, it would, when examining the petition on the merits, request detailed information on the procedural status of the case in relation to them.

43. The State affirms that it cannot help noting the petitioner's obvious hurry to submit the facts to the Commission before exhausting domestic remedies. The existence of 5 (five) ongoing actions for reparation, whereby the victims are seeking compensation from São Paulo State, means that the present petition constitutes a duplicate attempt to obtain civil reparation, which conflicts with the principle of non bis in idem. In conclusion, the State explains that the present case cannot be admitted by the Commission, since international jurisdiction is subsidiary to local jurisdiction. Nor is international jurisdiction an appeal instance, in accordance with the formula of the so-called "fourth instance." A number of cases decided by the Commission are cited, with verbatim transcriptions thereof. The case should be declared inadmissible, pursuant to Articles 46(1)(a) of the American Convention and 32(1) of the Commission's Rules of Procedure.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. The Commission's competence *rationae personae*, *rationae loci*, *rationae temporis*, and *rationae materiae*

44. Under Article 44 of the Convention, the petitioner is entitled to lodge complaints with the Commission. The petition names José Airton Honorato, José Maria Menezes, Aleksandro de Oliveira Araujo, Djalma Fernandes Andrade de Souza, Fabio Fernandes Andrade de Souza, Gerson Machado da Silva, Jeferson Leandro Andrade, José Cicero Pereira dos Santos, Laercio Antonio Luis, Luciano da Silva Barbosa, Sandro Rogerio da Silva, and Silvio Bernardino do Carmo, citizens of the State, as the alleged victims. The Commission is therefore competent *rationae personae* to examine the petition.

45. The State ratified the American Convention on September 25, 1992.

46. The Commission is competent *rationae loci* to examine the petition, inasmuch as it alleges violations of rights protected under the American Convention, said to have taken place within the territory of a State Party to the Convention.

47. The IACHR is competent *rationae temporis*, since the obligation to respect and ensure the rights protected under the American Convention was in effect for the State on the date the facts alleged in the petition were said to have occurred.

48. Finally, the Commission is competent *rationae materiae* because the petition alleges violations of human rights protected by the American Convention.

B. Admissibility Requirements

1. Exhaustion of domestic remedies

49. Under Article 46(1)(a) of the American Convention, for a petition to be admissible, the remedies available under the domestic law of the State must have been exhausted in accordance with generally recognized principles of international law.

50. Article 46(2) provides that the provisions relating to the exhaustion of domestic remedies shall not be applicable when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

51. The petitioner has stated that the origin of the complaint is the murder of the alleged victims. Up to the date on which the petition is being examined, while there is a criminal indictment against 54 (fifty four) defendants (at the outset there were 55 (fifty five) defendants; one died after the commencement of proceedings, according to the most recent information provided at the hearing on October 19, 2006), none of them has yet been convicted or exonerated, and there is sufficient evidence that the case has not even gone beyond the investigation phase. More than 4 (four) years have elapsed since the events described in the complaint took place. According to information also provided at the aforesaid hearing,[FN11] the criminal action against the defendants was instituted in December 2003. More than 3 (three) years have elapsed since that time.

[FN11] Written argument submitted by the State, p. 3, annex 1.

52. The State objected to the failure to exhaust domestic remedies, arguing that the criminal proceeding against 54 (fifty four) defendants is following normal procedures within the relevant time frame established by local legislation.

53. It must be noted that there has been an express recognition by the State[FN12] that up to October 19, 2006, the criminal proceeding has "...proceeded only as far as the interrogation of two co-defendants who had allegedly operated as police collaborators...." It is not even affirmed that the defendants have appeared in court. Moreover, the State claimed that the delay in summoning the defendants is due to the fact that they are members of the Military Police, who are constantly moved from place to place because of their duties, so that it is difficult to find them, and summoning them requires the assistance of several judges who have to issue the respective documents. This statement strengthens the conviction of the present body that no accused police officer has yet appeared in court; the explanation offered by the State's representatives is not convincing, nor does it justify the failure, 3 (three) years after the commencement of the criminal case, even to formally interrogate those who would appear to be the alleged perpetrators of the events in question.

[FN12] Argument submitted by the State, p. 3, para. (d).

54. The jurisprudence of the inter-American system is skewed as follows: "...the international protection of human rights" to which Article 46(1) of the Convention refers "is founded on the need to protect the victim from the arbitrary exercise of governmental authority..."[FN13]. The exceptions set out in Article 46(2) of the Convention are intended to guarantee international action precisely in situations in which domestic remedies, and the national judicial system itself, are ineffective in guaranteeing the exercise of the victims' human rights.

[FN13] I/A Court H.R., Godínez Cruz Case. Preliminary Objections. Judgment of June 26, 1987. Series C No. 3.

55. The premises outlined in the preceding paragraph mean nothing other than that, if there is unwarranted delay in the processing of domestic remedies, it may be inferred that those remedies have become ineffective in producing the result for which they were established, thereby "render[ing] the victim defenseless."[FN14] This is the circumstance in which international protection mechanisms, including the exceptions provided for in Article 46(2) of the Convention, are applicable.

[FN14] I/A Court H.R., Godínez Cruz Case. Preliminary Objections. Judgment of June 26, 1987. Series C No. 3, para. 95.

56. In the present case, while the State affirms, on the one hand, that there are a number of remedies against the decisions that may be issued in the course of the proceeding, the reality, as reflected in the instruments attached by the State at the hearing on October 19, 2006 and in the statements of its representatives on that occasion, is that the process is virtually paralyzed. Despite the large number of defendants, in nearly 3 (three) years it has not been possible to get even one of them to appear in court, on the contention that they are members of the Military Police who are constantly moved from place to place because of their duties. The State's argument that the petition was submitted in a hurry because compensation proceedings instituted by relatives of the victims are under way in domestic courts fails, because in a case involving extrajudicial execution, the institution of a civil proceeding for compensation by a victim's heir becomes irrelevant insofar as exhaustion of domestic remedies is concerned. The jurisprudence of the inter-American system has repeatedly held that the remedy to be exhausted in such cases is a criminal investigation.

57. The Commission believes that, as a general rule, a criminal investigation should be conducted promptly to protect the interests of the victims and preserve evidence. In this case, the Commission observes that the murder of the 12 (twelve) alleged victims occurred on March 5, 2002. According to information received up to the date on which the present report was drafted, nearly five years after the event, there has been no final judgment against any of the defendants in connection with those murders; furthermore, as of October 19, 2006, it had not even been possible to get them to appear for trial. The Commission considers that the time that has elapsed

without all of the perpetrators being investigated, tried, and punished is a sign of unwarranted delay and of scant prospects for the effectiveness of all the procedural remedies applicable to the case. In weighing the argument put forward by the State regarding the number of defendants and the excessive complexity of the case against the time that has elapsed since the events took place without even one court appearance having been achieved, the Commission considers that the exception provided in Article 46(2)(c) of the Convention, referring to unwarranted delay in rendering a final judgment under the aforementioned remedies, is applicable in this case.

58. All that remains to be said is that invocation of the exceptions to the rule requiring exhaustion of domestic remedies, provided for in Article 46(2) of the Convention, must be closely linked to the determination of possible violations of certain rights enshrined therein, such as the guarantees of access to justice. However, Article 46(2) of the American Convention is, by its nature and purpose, a norm with autonomous content vis-à-vis the substantive norms of the Convention. Accordingly, the question of whether the exceptions to the rule of exhaustion of domestic remedies provided for in that norm are applicable to the case in question must be determined beforehand, separately from the analysis of the case on the merits, since it relies on a standard of judgment different from the one used to determine a violation of Articles 8 and 25 of the Convention. It must be clarified that the causes and effects that have prevented the exhaustion of domestic remedies in the present case will be analyzed, in their pertinent aspects, in the report that the Commission will adopt on the merits of the dispute in order to establish whether they actually constitute violations of the American Convention.

59. The Commission therefore concludes that the complaint under consideration is admissible in accordance with the requirements established in Article 46(2)(c), cited above.

2. Deadline for presentation of petitions

60. Pursuant to Article 46(1)(b) of the Convention, the presentation of petitions within a period of 6 (six) months from the date on which the alleged victim was notified of the final judgment that domestic remedies had been exhausted is an admissibility requirement. Article 32(2) of the Commission's Rules of Procedure provides that "[i]n those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case." [FN15]

[FN15] IACHR, Report No. 31/ 99, Case 11.763, Plan de Sánchez Massacre, Admissibility, March 11, 1999.

61. In the present case, the Commission expressed its opinion, *supra*, on the applicability of the exception to the requirement of prior exhaustion of domestic remedies. Therefore, the Inter-American Commission must determine whether the petition was presented within a reasonable period of time, as set out in Article 32(2) of its Rules of Procedure. In this regard, the Commission considers that the petition submitted by the petitioners on April 24, 2003, was

lodged within a reasonable period of time, bearing in mind the specific circumstances of the present case, particularly the date on which the events occurred (March 5, 2002), and the unwarranted delay in the processing of the criminal case (which is in the investigative phase) in which the defendants are the alleged perpetrators of the 12 (twelve) murders that are the subject of the present complaint. In weighing the time that has elapsed since the events took place against the police and judicial activity instituted as a result, the combination of these factors leads the Commission to consider that the petition was presented within a reasonable time in relation to the period specified in Article 32 of its Rules of Procedure.

3. Duplication of procedures and international res judicata

62. Nothing in the file suggests that the subject-matter of the petition is pending in another international settlement proceeding, or that it replicates a petition already examined by the Commission or another international body. The Commission therefore concludes that the requirements established in Articles 46(1)(c) and 47(d) of the Convention have been met.

4. Description of the alleged facts

63. For admissibility purposes, the IACHR must decide whether the facts stated could characterize a violation, as stipulated in Article 47(b) of the American Convention, and whether the petition is “manifestly groundless” or “obviously out of order,” in accordance with Article 47(c).

64. The standard of appreciation of these provisions is different from that required to decide on the merits of a complaint. The IACHR must make a prima facie evaluation to examine whether the complaint establishes the apparent or potential violation of a right guaranteed by the Convention, and not to establish the existence of a violation. Such an examination is a summary analysis that does not imply any prejudice or preliminary opinion on the merits.[FN16]

[FN16] IACHR, Report No. 21/04, Petition 12.190, José Luís Tapia González et al., Admissibility, Chile, February 24, 2004, para. 33.

65. The Commission does not find that the petition is "manifestly groundless" or "obviously out of order." It therefore considers that, prima facie, the petitioners have satisfied the requirements established in Article 47(b) and (c) of the Convention.

66. In light of the foregoing, the Commission considers that the facts stated in relation to violations of the right to life, and the right to judicial guarantees and judicial protection committed against the alleged victims and their families may, if proven, raise the possibility of a violation of Articles 4, and 8(1) of the Convention in relation to the general obligations contained in Article 1(1) of the Convention. Invoking the principle of iura novit curiae, the Commission finds that the facts can constitute a violation of Article 25 of the Convention.

67. The conclusion set out in the preceding paragraph has been arrived at on the basis that the right to life may have been violated by the extrajudicial execution of the 12 (twelve) alleged victims; and the rights to judicial protection and judicial guarantees may have been violated in relation to the family of these 12 (twelve) individuals because of the excessive delay in the investigation of the criminal case.

68. As to the potential violation of Article 5 of the Convention, it is alleged by the petitioner to have taken place in view of the physical mistreatment suffered by 2 (two) prisoners working for the GRADI who escaped on April 1, 2002. However, neither the identity of these 2 (two) individuals nor any evidence that would show the injuries caused to them has been produced, so the petition must therefore be declared inadmissible in that respect.

69. Regarding the allegation made by the petitioners, in reference to the presumed violation of Article 6 of the Convention, the Commission understands that the supposed use by the State of sentenced prisoners to infiltrate themselves as informants in criminal organizations as it is claimed in the petition, does not materialize a situation analogue to a case of contemporary slavery, having to be declared inadmissible because of these matter.

V. CONCLUSION

70. The Commission concludes that it is competent to examine this petition and that the petition fulfills the admissibility requirements, in accordance with Articles 46 and 47 of the American Convention and Article 30 and related articles of its Rules of Procedure.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare, without prejudging on the merits of the present complaint, that the petition is admissible in relation to the alleged facts and to Articles 4 (right to life), 8 (right to a fair trial), and 25 (right to judicial protection) of the American Convention, as well as in relation to the obligation to respect and guarantee the enjoyment of the rights and guarantees contemplated in this instrument that is referred in Article 1(1) of the American Convention.
2. To declare the petition inadmissible in relation to Article 5 (right to humane treatment) and 6 (freedom from slavery and involuntary servitude) of the Convention.
3. To deliver the present report to the State and the petitioner.
4. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed by the Inter-American Commission on Human Rights in Washington, D.C., on the 3rd day of the month of March 2007. (Signed) Florentín Meléndez, President; Paolo Carozza, First Vice-President; Clare K. Roberts, Freddy Gutiérrez, and Evelio Fernández Arévalos, members of the Commission.