Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 41/07; Petition 998-05
Session:	Hundred Twenty-Eigth Session (16 – 27 July 2007)
Title/Style of Cause:	Lazinho Brambilla da Silva v. Brazil
Doc. Type:	Decision
Decided by:	President: Florentin Melendez; First Vice-President: Paolo Carozza; Second Vice-President: Victor Abramovich; Commissioners: Clare K. Roberts, Evelio Fernandez Arevalos, Freddy Gutierrez. Pursuant to the provision of article 17(2)(a) of the IACHR's Rules of Procedure, Commissioner Paulo Sergio Pinheiro, of Brazilian nationality, did not participate in the decision of this petition.
Dated:	23 July 2007
Citation:	Brambilla da Silva v. Brazil, Petition 998-05, Inter-Am. C.H.R., Report No. 41/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007)
Represented by:	APPLICANTS: Conectas Direitos Humanos and Associacao de Maes e Amigos de crianzas e Adolescentes em Risco
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I. SUMMARY

1. On September 2, 2005, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "IACHR") received a petition submitted by Tereza de Jesús Brambilla, Conectas Direitos Humanos and Associação de Mães e Amigos de crianzas e Adolescentes em Risco (AMAR) (hereinafter "the petitioners") alleging the violation of Articles 1(1), 4, 19, and 25 of the American Convention on Human Rights (hereinafter "the American Convention"), with prejudice to the child[FN2] Lazinho Brambilla da Silva (hereinafter "the alleged victim"), by the Federal Republic of Brazil (hereinafter "Brazil" or "the State").

[FN2] According to the Convention on the Rights of the Child of the UN, "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. The Brazilian Criminal Code establishes that people under eighteen years of age are criminally incompetent and are subject to special legislation. The Brazilian Statute of the Child and Adolescent establishes in its Article 2 that a child for the legal effect of that instrument are the persons as old as twelve uncompleted years and adolescents are the persons between twelve and eighteen years of age. The Commission, following the established in the Convention on the Rights of the Child uses the word "child" in the present report, to refer to

the alleged victim, Lazinho Brambilla da Silva, who was sixteen years old at the time of his murder.

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2. The petitioners report that the alleged victim, 16 years of age, was murdered on November 9, 2003. This happened during a mass escape from Unit III of the Vila Maria Complex, Adoniran Barbosa, of the State Foundation for Children's Welfare [Fundación Estadual del Bienestar del Menor] (hereinafter FEBEM) of Sao Paulo, where he was confined. To this violation, allegedly another was added, i.e., the lack of compliance with due process: when the police incurred in omissions in the gathering of evidence, and in the lack of appeals against the wrongful closing of the case by the judge, with the acquiescence of the Office of the Prosecutor.

3. The State responded to the petition on January 12, 2007, and affirmed that there was a lis pendens related to petition 12.328, under processing by the Commission, that the instant petition was untimely, and lodged the objection of lack of exhaustion of domestic remedies. Regarding the lack of exhaustion of domestic remedies, the State maintained in a March 1st, 2007 hearing that the closing of the case is not final, and that should the case become a federal one, a new investigation and trial of the facts would take place, and that hence an effective remedy exists that has not yet been exhausted.

4. After analyzing the petition, and pursuant to the provisions of Articles 46 and 47 of the American Convention on Human Rights, and Article 30 and related articles of its Rules of Procedure, the Commission decided to declare the petition admissible with respect to the alleged violations of articles 4, 8(1), 19, and 25 of the American Convention, in connection with the general obligation to respect and guarantee rights, established by Article 1(1) of same. 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.

II. PROCESSING BEFORE THE COMMISSION

5. The original petition was received by the Commission on September 2, 2005, and was registered under number 998-05. On October 14, 2005, the Commission communicated to the petitioner that it was in receipt of the petition. On July 7, 2006, pursuant to Article 30 of its Rules of Procedure, it forwarded to the State the relevant parts of the petition, requesting its response and granting it two months for this purpose. The latter was communicated to the petitioner on the same date.

6. On October 6, 2006, the State sent a note to the Commission, reporting that in the information received there was no filing date recorded for the petitioners' complaint.

7. On December 28, 2006, the Commission informed the State that the complaint had been received on September 2, 2005.

8. On January 3, 2007, the State submitted its response to the petition. The Commission acknowledged it was in receipt of said response on January 23, 2007, and the response was forwarded to the petitioners, granting them one month to submit their observations.

9. On January 15, 2007, the petitioners requested a hearing. The Commission communicated to both parties on February 1st, 2007 that the hearing had been granted.

10. The petitioners confirmed on February 7, 2007 that they would be present at the hearing.

11. The hearing took place on March 1st, 2007, with both parties present, during the 127th Regular Session of the Commission. In the hearing the petitioners submitted a brief with their position, which was added to the record of the case.

12. The petitioners, as required, submitted their observations to the State's response on March 9, 2007. The Commission communicated to them that it was in receipt of their response, and the petitioners' observations were forwarded to the State on April 16, 2007.

13. The petitioners submitted additional information regarding their petition on April 10, 2007. The Commission acknowledged receipt of this information on April 17 of the same year, and it was forwarded to the State.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

14. The petitioners assert that Lazinho Brambilla da Silva, son of Tereza de Jesús Brambilla and Lazaro Pereira da Silva, born on December 23, 1986, was murdered on November 9, 2003, at the age of sixteen. The alleged victim at the time was confined in the Vila Maria III Unit – Adoniran Barbosa, of the State Foundation for Children's Welfare (FEBEM) of Sao Paulo. During a mass escape on that date, he was shot five times; he was subsequently taken to the hospital, where he died.

15. The petitioners contend that the facts occurred within an environment of impunity and constant violations of the right to life on the part of agents of the state. This pattern, they further maintain, exists within a culture of violence exercised by state agents, using their monopoly of the use of force, that has usually gone unpunished.

16. According to the petitioners, the shortcomings in the investigation of the alleged victim's case are precisely due to the fact that the main suspect of having committed the homicide is the director of the facility where the adolescent was being held. They further allege that another intervening factor is that the youth came from a poor, Black family, and was responsible for an act that brought about his internment in a rehabilitation program. The petitioners state that their petition does not seek the punishment of the director of the unit, since the investigations did not follow due process, but they do petition that it be established who are the guilty parties responsible for the murder of the alleged victim, as well as who is responsible for the procedural flaws that caused the crime to go unpunished.

17. The petitioners maintain that a culture of impunity of state agents as perpetrators has arisen regarding groups that are vulnerable and that are discriminated against, such as incarcerated persons, especially young people and adolescents. Acts committed by these agents, they assert, are not investigated exhaustively and tend to remain without conclusion, which in turn favors the continuance of abusive practices against the right to life.

18. The petitioners affirm that, according to partial data from the Ministry of Justice referring to only five states of the federation: São Paulo, Rio de Janeiro, Bahia, Pará, and Rio Grande do Sul, 1,479 persons were killed by the police in the year 2000, and 1,538 in the year 2001. They assert that the lack of complete, detailed, official data on the number of civilians killed by the police also shows the inefficiency of the public justice system in addressing the problem.

19. The petitioners assert that the states of São Paulo and Rio de Janeiro are those that have the highest rates of police violence. An average of 1.44 and 1.78 persons for every 100,000 inhabitants, respectively, have been killed by the police. These figures mean, they further contend, that for every 1,000 police officers, 6.36 and 7.45 persons were killed in the federal states of São Paulo and Rio de Janeiro, according to information from the police ombudsman [Ouviduria de Policía].

20. The petitioners claim that some of these fatalities are caused by confrontations between civilians and the police, where the death of some civilians is inevitable. They argue, however, that a large number of these deaths perpetrated by police officers are the result of illegal actions involving an abusive use of lethal force in conflict situations, which frequently descends into summary execution of civilians; for this reason, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions visited Brazil in 2003.

21. The petitioners contend that, with respect to summary and arbitrary executions carried out by police officers, according to data of the São Paulo Ombudsman for the Police [Ouvidoria da Polícia do Estado de São Paulo], the punishment rate of the civilian police reported is only 7.2%, and only 2.4% for the military police involved in violations of the aforementioned civil rights.

22. According to the petitioners, this pattern of violence and impunity is also found in the FEBEM of São Paulo, where, since the middle of 2003 to date, 22 adolescents in confinement were killed by direct action or died as a result of acts of omission by state agents, both cases for which the State is responsible. They maintain that in many of the circumstances of these cases were never fully clarified, as is the case of the alleged victim. This pattern has manifested itself regarding the youths confined in the FEBEM of São Paulo, despite numerous reports of torture; the first conviction of employees of this institution for actions of this nature was handed down in the year 2005.

23. The petitioners assert that the instant case clearly reflects the aforementioned culture of impunity which gravely violates human rights.

24. According to the petitioners, Lazinho Brambilla da Silva, a Black Brazilian, the son of Tereza de Jesús Brambilla and Lazaro Pereira da Silva, born on December 23, 1986, was committed to the FEBEM of São Paulo for rehabilitation, after having been convicted of an unlawful act. The petitioners assert that he participated in a mass escape on November 9, 2003, from Unit III of the Adoniran Barbosa Vila Maria Complex.

25. The petitioners allege that the reasons for the escape were not clear, but that probably the condition of the facility were a contributing factor; there had even been a visit by a judge of the Department of Implementation for Children and Adolescents [Departamento de Ejecuciones de la Infancia y la Juventud], who reported that the director of the unit himself was aware of the fragility of the structure for the purpose of holding adolescents, and noted that external contention was inadequate, since the street walls should have been higher, that there was no protection for the gates to the modules, there was insufficient security personnel relative to the number of inmates, that there were infiltrations, there were no professional training courses and psycho-social attention was deficient.

26. The petitioners inform the Commission that, according to the description in police Incident Report No. 2720/2003, the alleged victim, brandishing a sort of stiletto, forced the owner of a store who sells sweets in the locality to hand over the keys to his vehicle, a red 1997 Fiat Palio, license plate number CLR 2133. They maintain that the moment the alleged victim entered the automobile he was shot five times at point-blank range. He remained, wounded, in the car, and was later taken to the hospital in Tatuape, where he died of his injuries.

27. The petitioners state that police investigation of the crimes of automobile theft and murder, was initiated on November 10, 2003, and assigned number 393/2003, by the 81st Police District of the Civil Police of the State of São Paulo. Police Incident Report No. 2721/2003 on the successful escape, its instigation, and the resulting damages was added to the procedure. This report stated that a person who visited the facility on November 9, 2003, and who aided the escape, had been investigated.

28. The petitioners report that there are depositions of witnesses to the events, which are in the record of the police investigation. This record also has the alleged victim's autopsy report carried out by the Institute for Forensic Medicine of the Office of the Superintendent of Scientific and Technical Police [Instituto Medico Legal de la Superintendencia de la Policía Técnico Científica], which was attached as documentary evidence by the petitioners. The report states that projectiles from a firearm were found in three places on the body of the alleged victim, and there are marks of two other projectiles which exited the body, from which the conclusion follows that the individual sustained five gunshot wounds. The petitioners state that no ballistics exam was carried out.

29. According to the petitioners, on December 8, 2004, Tereza de Jesús Brambilla, mother of the alleged victim, gave her deposition at the 81st Police District, in which she stated that a FEBEM employee had been the one who made the gunshots that killed her son, and that she had learned of this through conversations with mothers of other inmates: on the day of the facts the aforementioned employee had placed himself in the front of the unit, and had ordered the adolescents to go back inside, or else he would kill them all. Likewise, she had learned that three

other inmates witnessed the death of the alleged victim, but that they would not testify out of fear. The petitioners contend that at the time she made her statement, the mother of the alleged victim demanded justice and that the State be held accountable for her son's death.

30. The petitioners contend that on the same day, December 8, 2004, the Chief of Police [Delegada de Policía] in charge addressed Communication No. 3380/2004 to the president of FEBEM, ordering that the employee identified as responsible appear to submit his testimony. On December 21, 2004 she was informed that there was no person with that name on their roster. The petitioners assert that on January 10, 2005, a new communication was issued, this time to the director of FEBEM, summoning him to appear to submit testimony, which received a response on January 21, 2005, relating to the Chief of Police that the employee in question had left the institution on July 21, 2004, and attaching a dossier with the individual's personal information. Subsequently, the petitioners assert, there were no proceedings carried out to find the alleged perpetrator.

31. According to the petitioners, Administrative Procedure No. 2079/2003 was added to the police investigation, with the purpose of investigating the escape and capture of the adolescents, in the course of which the death of the alleged victim occurred on November 9, 2003. This entire procedure, they contend, was based on witness testimony, both of inmates of the facility, whose depositions are attached as annexes 21 through 39 of the petition, and of officers of the institution, attached as annexes 40 through 53 of the petition, and other guards employed by a different company, who provided their services on the site, attached as annexes 54 through 64 of the petition. The petitioners affirm that the interrogations in which these depositions were obtained centered on how the mass escape from the facility occurred, and none included questions about the events related to the death of the alleged victim.

32. The petitioners claim that after the testimony of the director of FEBEM had been obtained,[FN3] it turned out not to provide information on the death of the alleged victim; some facts were obtained only from the testimony of the coordinator of the team,[FN4] but this information was not relevant either.

[FN3] This is attached to the petition as annex 65.
[FN4] Attached to the petition as annex 66.

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33. The petitioners maintain that the administrative procedure's finding was that the death of the alleged victim was not caused by misconduct on the part of the officers investigated, and the case was closed on July 28, 2004.

34. According to the petitioners, on February 9, 2005, after a series of extensions to the deadlines for the conclusion of the police investigation, the police report was referred to the Judge of the Department of Police Investigations and Judicial Police [Departamento de Investigaciones Policiales y Policía Judicial] of São Paulo, who decided to close the case file on February 24, 2005.[FN5] The petitioners further assert that on March 3 the criminal court in charge of the case, despite the fact that several procedures had been carried out to clarify who

was the perpetrator,[FN6] decided to dismiss the case for lack of evidence, a decision against which there is no appeal.

[FN5] Attached to the petition as annex 70.
[FN6] Attached to the petition as annex 71.

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35. Likewise, the petitioners contend that the Ministry for Children and Adolescents [Ministerio de la Infancia y la Juventud] of the capital of the State of São Paulo, pursuant to article 201.VI of the Statute for the Child and the Adolescent [Estatuto del Niño y del Adolescente] initiated an administrative proceeding [protocolado] to investigate the flight of the alleged victim, and the circumstances surrounding his death, both of which had never been clarified. They further maintain that the record of said proceeding contains Communication No. 759/03 of the Commission for the Monitoring of Rehabilitation Measures [Comisión de Acompañamiento de Medidas Socio Educativas], which refers to the unit from which the escape occurred; it includes the depositions of inmates testifying that they had seen the director of the unit at the time of the facts, and that he was armed and shouting orders to those who were escaping to return. Allegedly, faced with this testimony, the Office of the Public Prosecutor for Children and Adolescents [Promotoría de Justicia de la Infancia y la Juventud] for the Capital, of the Office of the Attorney General for the State of São Paulo [Ministerio Público del Estado de Sao Paulo], issued communication No. 1989/03/MP/DEIJ to the Office of the Federal Attorney General [Procurador General de Justicia], requesting the assignment of a criminal prosecutor to monitor the investigations that had been initiated, but without learning of any results. The petitioners state that in the initiated proceedings, only one adolescent submitted testimony.

36. The petitioners state that the mother of the alleged victim testified on September 1st, 2005 at the headquarters of Conectas Derechos Humanos, and said that she had been threatened by agents of the Office of the Chief of Police when she gave her deposition there. She was told to stop accusing the director of the unit where the facts of the case had occurred, without any evidence. The petitioners also state that police officers of the location prevented the mother of the alleged victim from speaking with next of kin of other inmates of the unit at the time she made her deposition. The petitioners argue that the mother of the deceased stated that she knew that the director of the unit where her son was confined mistreated the inmates, and had acted in the same way when he was the director of another similar unit. The mother also testified that FEBEM did not provide assistance of any kind for the funeral of her son.

37. In briefs submitted after the original petition, the petitioners stated that the police investigation was reopened on January 19, 2006, and was once more closed on January 11, 2007.

38. To summarize all the petitioners' submissions, they contend, and request that the Commission find, that the petition meets all admissibility requirements; they request that the Commission find the State responsible for the violation of articles 1(1), 4, 19, and 25 of the American Convention, that the Commission recommend to the State the reopening of the police investigation of the facts, that it reform article 18 of the Code of Criminal Procedure to create an

appeal against the closing of a police investigation, and that it adequately compensate the alleged victims.

B. Position of the State

39. The State contended, in a January 3, 2007 communication, that the petition was lodged in an untimely fashion, considering the time period established by Article 46(1)(b) of the Convention and article 32 of the Commission's Rules of Procedure. It subsequently reiterated this argument in the March 1, 2007 hearing.

40. In the hearing that took place on March 1st, 2007, the State argued that there was a lis pendens with respect to the instant petition, in case 12.238, since the alleged victim was an inmate of FEBEM and his name is included in the list of alleged victims of the latter case, given that it covers all the facilities of the institution in question, including the unit where the facts on which the petition sub judice is based took place.

41. According to the State, in the admissibility report on case 12.238, specific examples were given. In the State's understanding, this case refers to several alleged systematic violations of diverse rights of adolescents currently under rehabilitation in the FEBEM facilities, including a chronic pattern of riots and escapes. The State maintains that, given that the Commission requested the identification of all of the adolescents confined in the units of the system since the year 2000, the alleged victim of the instant petition is included, which reaffirms the existence of a lis pendens.

42. In the aforementioned hearing, it was requested that the minutes of the hearing that took place for case 12.238 be added to the record of the instant petition; these minutes attest to the fact that petition 998-05 is included in that case. On these grounds, the State requests that the petition be declared inadmissible.

43. When the State responded to the petition, on January 3, 2007, its argument regarding the lack of exhaustion of domestic remedies was based on the fact that the police investigation had been reopened on January 16, 2006. However, in the hearing of March 1, 2007, the State argued that the lack of exhaustion of domestic remedies was based on the fact that the appeal to have the case tried domestically at the federal level had not been exhausted.

44. The position of the State is that the Federal Constitution establishes all the requirements that need to be met in order for the Attorney General to request a change of jurisdiction for a case from the state to the federal level. It further contends that, at the federal level, once investigations are reopened, all circumstances in fact and in law of the case may be re-investigated. On these grounds, according to the State, the petitioners' argument that the investigations carried out under domestic jurisdiction have been ineffective cannot be found to be a valid one, bearing in mind that the transfer of the case to the federal venue will allow a new investigation, at this new level, of all the facts of the case.

45. The State maintains that a request to transfer a case to the federal level is an exceptional remedy, applicable to grave situations that imply state responsibility. In the March 1st, 2007

hearing, the State asserted that to date only one case including said request, i.e., the case of Sister Dorothy Stang. The request was denied, not because there had not been a grave violation of the human rights of the victim, but because the state instances had been functioning adequately: some of those responsible for her homicide had been convicted and sentenced. The State argues that, therefore, the hearing of the case at the federal level is an effective instrument to reopen the investigation and carry out a new trial of the facts when, pursuant to the Federal Constitution, there is a grave violation of human rights. Since this remedy has not been exhausted, and hence the requirements for admissibility established by the Convention have not been met, the petition must be declared inadmissible.

46. In conclusion, both in its response and in the hearing regarding the instant petition, the State requests that the petition be declared inadmissible, because there is a lis pendens in case 12.328, and because there is a lack of exhaustion of domestic remedies.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence of the Commission rationae personae, rationae loci, rationae temporis and rationae materiae

47. The petitioners are authorized by Article 44 of the Convention to submit petitions before the IACHR. The instant petition identifies Lazinho Brambilla da Silva, Tereza de Jesús Brambilla and Lazaro Pereira da Silva as the alleged victims. Therefore, the Commission is competent rationae personae to examine the petition.

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

49. The Commission is competent rationae loci to hear the petition, because it claims the existence of violations of rights protected by the American Convention within the territory of a State party to same.

50. The IACHR is competent rationae temporis, because the obligation to respect and guarantee rights protected by the American Convention was in force for the State at the time the facts alleged in the petition occurred.

51. Finally, the Commission is competent rationae materiae, because the petition reports violations of human rights protected by the American Convention.

B. Requirements for admissibility

1. Exhaustion of domestic remedies

52. Article 46(1) of the American Convention establishes, as a requirement for admissibility of a complaint, the prior exhaustion of available remedies within the domestic jurisdiction of the State, in accordance with generally recognized principles of international law.

53. The petitioners have stated that their complaint originates from the murder of the alleged victim on November 9, 2003, during a mass escape of the Villa Maria III unit of the FEBEM of São Paulo. From the relation of the events it can be inferred that the perpetrator was an agent of the State and an employee of the unit, and that subsequently there was a denial of justice and a lack of compensation to the victim's next of kin.

54. The State grounded its objection regarding the lack of exhaustion of domestic remedies on the fact that the case has not been raised to the federal level, which in turn would lead to a new investigation and trial of the facts and would constitute an effective means to remedy, within the scope of domestic justice, the violations reported in the petition. Likewise, in the hearing of March 1, 2007, the State held that the closing of the police file on the case does not bring about the exhaustion of domestic remedies, since the case can be reopened should new factual evidence appear; for this reason, as well, the petition should be declared inadmissible.

55. An undisputed fact in the instant case is that the police investigation registered under No. 393/03 was opened on November 10, 2003, according to the report of complaint made to the Office of the Chief of Police No. 81 of Belém, within the jurisdiction of the State Civil Police of São Paulo.[FN7] The court decision to close the police investigation of the facts object of the petition took place on March 3, 2005.[FN8]

[FN7] This is reflected by the document attached to the petition as annex 8.
[FN8] The record of this decision is attached to the petition as annex 71.

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56. The purpose of police investigation in Brazil is to carry out inquiries related to the occurrence of criminal offenses and their perpetrators, as is the case of a death that occurred during a mass escape from a State rehabilitation unit, so that the Office of the Attorney General, pursuant to article 129 of the Federal Constitution, can carry out a prosecution, that is, if there has been a request to dismiss the case.

57. Regarding this matter, the Commission has held the opinion that in Brazil a court decision to close a police investigation is final, and this decision is not subject to appeal.[FN9] In fact, in accordance with Brazilian law, specifically the Code of Criminal Procedure, there is no appeal against a court ruling for the closing of a police investigation.[FN10] Therefore, once this ruling has been handed down, for the purposes of admissibility, domestic remedies have been exhausted.

[FN9] IACHR, Report No. 37/02, Admissibility, Case 12.001, Simone André Diniz, Brazil, October 9, 2002, paras. 25-27. IACHR, Report No. 80/05, Case 12.397, Inadmissibility, Hélio Bicudo, Brazil, October 24, 2005, para. 27.
[FN10] IACHR, Report No. 80/05, Case 12.397, Inadmissibility, Hélio Bicudo, Brazil, October 24, 2005, para. 28.

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58. The only possibility provided for in Brazilian criminal law for the re-opening of an investigation is the discovery of new evidence related to the case, pursuant to article 18 of the Code of Criminal Procedure,[FN11] and to Series 524 of the Supreme Federal Court.[FN12] In other words, although the closing of a police investigation does not entail res judicata, since it is a decision that is subject to reconsideration if new evidence is discovered, the IACHR considers that the decision to close an investigation entails the exhaustion of domestic remedies, since no appeal against it is possible.[FN13]

[FN11] This article provides that: "After a judicial authority, based on the lack of grounds for the complaint, has ordered the investigation closed, the police authority may initiate a new investigation should new evidence be discovered."

[FN12] Series 524 dissipates any possible ambiguity in the Code of Criminal Procedure, by establishing that: "Once the police investigation is closed, pursuant to a court order handed down at the request of the public prosecutor, a new criminal action may not be undertaken without the discovery of new evidence."

[FN13] IACHR, Report No. 80/05, Case 12.397, Inadmissibility, Hélio Bicudo, Brazil, October 24, 2005, para. 28.

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59. As aforementioned, the State contends that the raising of the case to the federal level constitutes an effective remedy for the carrying out of a new investigation and trial of the facts, and this remedy has not yet been exhausted.

60. Article 109 of Constitutional Amendment No. 45 of December 30, 2004 reads as follows: In the case of a grave violation of human rights, the Attorney General of the Republic, in order to ensure compliance with obligations under international human rights treaties to which Brazil is a party, may lodge, before the Supreme Court of Justice [Superior Tribunal de Justice – STJ], at any stage of an investigation or proceedings, a motion to change the venue of the case to that of the federal justice system.[FN14]

[FN14] 5º Nas hipóteses de grave violação de direitos humanos, o Procurador-Geral da República, com a finalidade de assegurar o cumprimento de obrigações decorrentes de tratados internacionais de direitos humanos dos quais o Brasil seja parte, poderá suscitar, perante o Superior Tribunal de Justiça, em qualquer fase do inquérito ou processo, incidente de deslocamento de competência para a Justiça Federal."

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61. It can be inferred from the aforementioned rule that the changing of the venue of proceedings from the State to the Federal level is limited to those cases in which a grave violation of human rights has occurred, and that this must take place at the request of the Attorney General of the Republic, who must lodge a motion within a proceeding before the Supreme Court of Justice.

62. It is the opinion of the Commission that this possibility of transferring to federal jurisdiction the investigation of grave human rights violations is of the greatest importance, and for this reason it had recommended that this measure be adopted in its 1997 Report on the Situation of Human Rights in Brazil. In this respect, this new remedy could constitute an adequate and effective recourse as provided for by Article 46(1)(a) of the American Convention and hence, in the appropriate circumstances, the petitioners could be under the obligation to exhaust it.

63. The aforementioned considerations lead the Commission to establish that, pursuant to article 109 of Constitutional Amendment No. 45, the Attorney General "may" request the transfer of a case to federal jurisdiction, so the Attorney General has both the authority and the discretionary capacity to decide whether the case has the necessary characteristics to lodge a request for a federal court to assume jurisdiction over it. In this respect, the Commission has already stated its opinion that if, within a proceeding the Attorney General or the competent officials are authorized to request a certain judicial action, and they do not do so, the negative consequences of this omission cannot be allowed to fall upon the petitioners. Specifically, the Commission considers that if the Attorney General moves to transfer an investigation to the federal jurisdiction, pursuant to article 109.5 of the Constitution, the petitioners should await its conclusion, in order to meet the requirement of exhaustion of domestic remedies, unless the case presents one of the exceptions provided for by Article 46(2) of the Convention. In the instant case, the Attorney General did not request that the inquiry be transferred to federal jurisdiction, and therefore the petitioners were not under the obligation to exhaust this remedy.

64. Based on the foregoing arguments, the Commission concludes that domestic remedies were exhausted on March 3, 2005, when the court decision closing the police investigation was handed down, and thus the requirement established by Article 46(1)(a) of the American Convention has been met.

2. Timeliness of the petition

65. Article 46(1)(b) of the American Convention provides that a requirement for the admissibility of a petition is that it be submitted within six months after the alleged victim has been notified of the decision that exhausts domestic remedies.

66. In the instant case, the Commission has found supra that the domestic remedies were exhausted through the March 3, 2005 decision, which is not subject to appeal. Since the petition was received by the IACHR on September 2, 2005, the opinion of the Commission is that it was submitted within the time period established by Article 46(1)(b) of the American Convention, and that this rule's requirement has been met.

3. Duplication of proceedings and international res judicata

67. The State affirms that in petition 12.328 there is a lis pendens with respect to the instant petition, since the former allegedly includes FEBEM as an institution, thus including as alleged victims all of its inmates, among them Lazinho Brambilla da Silva.

68. Article 47 of the American Convention provides that:

The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:

d. the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.

69. Regarding the abovementioned norm, the Court has held that the phrase "substantially the same" signifies that there should be identity between the cases. In order for this identity to exist, the presence of three elements is necessary, these are: that the parties are the same, that the object of the action is the same and that the legal grounds are identical.[FN15]

[FN15] I/A Court H. R., Case of Baena Ricardo et al. Preliminary Objections. Judgment of November 18, 1999. Series C, No. 61, para. 53.

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70. Regarding the legal subject, the Court has held that "'[p]ersons' has to do with the active and passive subjects of the violation, and mainly the latter, i.e., the victims."[FN16] In the instant case, the alleged victim is Lazinho Brambilla da Silva and his next of kin, and the petitioners are Tereza de Jesús Brambilla, Conectas Direitos Humanos and Associação de Mães e Amigos de Crianças e Adolescentes em Risco (AMAR).

[FN16] I/A Court H. R., Case of Durand and Ugarte. Preliminary Objections. Judgment of May 28, 1999. Series C., No. 50, para. 43. Case of Baena Ricardo et al., idem, para. 54.

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71. Petition 12.328 reported alleged violations of human rights with prejudice to adolescents accused of committing crimes and who were held in nine FEBEM units of the State of São Paulo: Inmigrantes Complex, Center for Criminological Observation (COC), Carandirú Complex, Cadeião de Santo André, Cadeião de Pinheiros, Tatuapé Complex, Franco da Rocha Complex and the Unit for Initial Assistance (UAI).[FN17] None of these is the Villa Maria III Unit.

[FN17] IACHR, Report No. 39/02, Admissibility, Petition 12.238, Adolescents in the Custody of the FEBEM, Brazil, October 9, 2002, para. 34.

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72. In its Report No. 39/02 on petition 12.328 of October 9, 2002, the Commission determined that, at the merits stage of a case, the petitioner, with the cooperation of the State, had to identify the adolescents held in the FEBEM units,[FN18] pursuant to Inter-American Court precedents.[FN19]

[FN18] IACHR, Report No. 39/02, Admissibility, Petition 12.238, Adolescents in the Custody of the FEBEM, Brazil, October 9, 2002, para. 27.
[FN19] The Court issued an order on June 21, 2002, related to the Case of the "Juvenile Reeducation Institute" v. Paraguay, by which it admitted the application in the instant case only with respect to those persons identified in it. The Court also requested the Commission to identify by name, within three months, "all the child and adolescent inmates of the Juvenile Reeducation Institute 'Panchito López' who were held between August 1996 and July 2001, and who were subsequently transferred to adult prisons of the country" and stated that, should said information not be received, proceedings in the case would continue only regarding the alleged victims identified in the application.

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73. It can be seen that the triple identity required by the Court to declare a complaint inadmissible on the basis of a lis pendens cannot be found in the instant case, because the alleged victims of both petitions are not the same; for this reason, the inadmissibility allegation lodged by the State must be dismissed. [FN20]

[FN20] I/A Court H. R., Case of Durand and Ugarte. Preliminary Objections. Judgment of May 28, 1999. Series C., No. 50, para. 43. I/A Court H. R., Case of Baena Ricardo et al. Preliminary Objections. Judgment of November 18, 1999. Series C, No. 61, para. 55.

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74. It is the Commission's understanding that there is no evidence in the record that the petition is pending in another international proceeding, and, not having received any information so indicating, that the requirements of Articles 46(c) and 47(d) of the Convention have been met.

4. Characterization of the facts alleged

75. For the purposes of admissibility, the IACHR must decide whether the facts reported could characterize a violation, pursuant to Article 47(b) of the American Convention, and whether the petition is "manifestly groundless" or "obviously out of order," pursuant to paragraph (c) of same.

76. The standard by which to assess these requirements is different from the standard used when deciding the merits of a petition. The IACHR must carry out a prima facie evaluation to determine whether the petition establishes the grounds for a possible or potential violation of a Convention-protected right, but it does not have to establish the actual violation of rights. This evaluation constitutes a preliminary analysis that does not entail a prejudgment of the merits of the case.[FN21]

[FN21] IACHR, Report No. 21/04, Petition 12.190, José Luis Tapia González et al., Admissibility, Chile, February 24, 2004, para. 33.

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77. The Commission has not found that the petition is "manifestly groundless," or that it is "evidently out of order." Therefore, it is the Commission's opinion that prima facie, the petitioners have met the requirements of Article 47, paragraphs (b) and (c) of the Convention.

78. Bearing in mind the foregoing, it is the opinion of the Commission that, should the aforementioned facts with respect to the violation of the right to life, the rights of the child, and the right to judicial protection, with prejudice to the alleged victim and his next of kin, there could be a violation of Articles 4, 19, and 25 of the Convention, in connection with the general obligation provided for by Article 1(1) of same. Applying the principle of iura novit curiae, the Commission finds that the facts could represent an infraction of Article 8(1) of the Convention, because the right to a fair trial of the next of kin of the alleged victim could have been violated.

79. The Commission reaches the conclusions stated in the foregoing paragraph based on the consideration that the right to life and the rights of the child could have been violated with the death of the alleged minor victim, with the employment of excessive force. The rights to appropriate judicial protection, and to a fair trial, could also have been infringed upon with prejudice to the next of kin of this individual, due to excessive delay in the preliminary criminal proceedings, which brought no results, and to the lack of compensation to the injured parties.

V. CONCLUSION

80. The Commission concludes that it is competent to examine the petition and that it meets the requirements for admissibility pursuant to Articles 46 and 47 of the American Convention, as well as Article 30 and related articles of its Rules of Procedure.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare, without prejudging the merits of the instant petition, that it is admissible with respect to the facts object of the complaint and with respect to Articles 4 (right to life), 8.1 (right to a fair trial), 19 (rights of the child), and 25 (right to judicial protection) of the American Convention, as well as the obligation to respect and guarantee rights provided for by article 1(1) of said treaty.
2. To forward this report to the State and to the petitioner.
3. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on the 23rd day of the month of July, 2007. (Signed): Florentín Meléndez, President; Paolo G. Carozza, First Vice-President, Víctor E. Abramovich, Second Vice-President; Clare K. Roberts, Evelio Fernández Arévalos, and Freddy Gutiérrez, Commissioners.