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Title/Style of Cause: Persons deprived of liberty at the Provisional Detention Center of Guarujá
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Decided by: Chairman: Paolo Carozza;
First Vice-Chairwoman: Luz Patricia Mejia Guerrero;
Second Vice-Chairman: Felipe Gonzalez;
Commissioners: Sir Clare K. Roberts, Victor E. Abramovich.
Commission Member Dr. Paulo Sergio Pinheiro, a Brazilian citizen, did not take part in the consideration and adoption of this Report, pursuant to article 17(2)(a) of the Rules of Procedure of the IACHR.
Dated: 23 July 2008
Citation: Persons deprived of liberty at Guarujá, Petition 478-07, Inter-Am. C.H.R., Report No. 41/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 (2008)
Represented by: APPLICANTS: the Conectas Human Rights Association, the Pro Bono Institute, and the Community Counsel on Prisons of Guarujá and Vicente de Carvalho
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I. SUMMARY

1. On April 18, 2007, the Conectas Human Rights Association, the Pro Bono Institute, and the Community Counsel on Prisons (Conselho Comunitario Penitenciario) of Guarujá and Vicente de Carvalho (hereinafter, referred to as “the petitioners”) filed with the Inter-American Commission on Human Rights (hereinafter, referred to as “the IACHR” or “the Commission”) a petition against the Federative Republic of Brazil (hereinafter, referred to as “Brazil” or “the State”), to which there was also attached a request for Precautionary Measures. This petition denounces the situation of overcrowding in the prison, degrading detention conditions, mistreatment and the consequent violations of the human rights of adults, male and female children and young people,[FN2] who are deprived of their liberty at the Cadeia Pública (Provisional Detention Center)[FN3] of the Municipality of Guarujá, State of Sao Paulo, Brazil. The petitioners state that the facts would tend to establish a violation of the right to life (Article 4), to humane treatment (Article 5), the rights of the child (Article 19) and the right to judicial protections (Article 25), as well as a breach of the State’s obligations to respect and ensure the rights of persons who are under its jurisdiction (Article 1.1) of the American Convention on Human Rights (“the American Convention”).

[FN2] The Commission uses the expression “young people” in this report to refer to alleged victims of both the male and female gender between the ages of 18 and 21 at the time of their entry into the detention center at issue. See note in reference No. 21.[FN3] According to article 102 of Brazil’s Law of Execution of Criminal Sentences (Ley de Ejecución Penal), “the ‘Cadeia Pública’ is intended to house provisional prisoners”, and accordingly, the term used to refer to the “Cadeia Pública do Guarujá” shall be Provisional Detention Center of Guarujá.

2. The State claims that domestic remedies have not been exhausted, inasmuch as four Public Civil Actions seeking to provide protection in a variety of ways with regard to the Provisional Detention Center of Guarujá are currently pending before the Brazilian Courts. It also argued that the time period for the proceedings of said actions has not gone beyond a reasonable amount, and therefore no basis exists for an exception to the requirement set forth by Article 46(2) of the American Convention.

3. After analyzing the petition, and in keeping with the provisions in Articles 46 and 47 of the American Convention, the Commission declares the petition admissible with regard to the alleged violations of the rights recognized in Articles 5, 19 and 25(1), in relation to the obligations emanating from Article 1(1), all of which are from the American Convention, as well as, on the basis of the principle of *iura novit curia*, Articles 2 and 8(1) of the American Convention and 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter, “Convention of Belem do Para”). The foregoing with regard to the children deprived of liberty in the Provisional Detention Center of Guarujá from 1999 to date, as well as regarding the youth and adults deprived of liberty in this center from 2004 to date. Regarding the alleged violation of Article 4 of the American Convention, the Commission finds the petition inadmissible. The Commission further rules that the parties shall be served notice of this decision, which shall be made public and shall be included in its Annual Report to the OAS General Assembly.

II. PROCESSING BY THE COMMISSION AND PRECAUTIONARY MEASURES.

4. On April 18, 2007, together with the petition filed with the Inter-American Commission, the petitioners submitted as well a request for precautionary measures aimed at protecting the lives and physical integrity of 14 children,[FN4] who are deprived of their liberty at the Provisional Detention Center of Guarujá.

[FN4] Whose names are: F.F.S.S., born 4-15-1991; B.S.L., born 3-3-1989; C.M.F., born 12-31-1988; D.S.N., born 9-10-1989; L.P.V.A., born 10-18-1989; L.C.S.C., born 10-19-1990; D.C.C., born 5-7-1991; B.N.G., born 6-8-1989; F.G.A., born 11-4-1989; D.G.S., born 2-8-1991; R.M.P., born 4-19-1990; O.B.M.S., born 6-24-1991; L.L.O., born 2-6-1992; F.C.C., born 9-5-1992.

5. On April 27, 2007, the IACHR requested additional information from the petitioners regarding the request for precautionary measures. Accordingly, on May 8, 2007, the Commission received a copy of the April 18, 2007 letter, together with the respective attachments.

6. On May 25, 2007, the petitioners sent to the Inter-American Commission additional information, reporting on an in loco visit conducted by the petitioners on May 9, 2007 to the Provisional Detention Center of Guarujá.

7. On June 19, 2007, in the context of the request for precautionary measures filed by the petitioners, and without prejudice to eventually instituting precautionary measure proceedings, the Commission requested information from the State on the measures of control and judicial protection with regards to conditions of detention which might have been adopted at the Provisional Detention Center of Guarujá[FN5]. On that same date, in the context of petition 478-07, the Commission decided to forward to the State the relevant parts of the petition filed, granting it, in using the power set forth in Article 30.4 of the Rules of Procedure, a period of one month to reply thereto.

[FN5] In this regard, the IACHR requested information on decisions relating to detention conditions at said prison and on the courts or judges issuing them, the scope and content of judicial control and protection measures adopted, concrete results obtained in compliance with the judicial control and protection measures ordered, possible difficulties in implementing these judicial measures and coordination between federal and state authorities in implementing judicial control and protection measures, as well as in adopting any other measure relating to this situation.

8. On July 6, 2007, the State submitted to the Inter-American Commission the requested information in the context of the proceedings for the request for precautionary measures, of which copies were served on the petitioners on August 15, 2007, for the petitioners to be able to submit their observations on the State's brief within a period of fifteen days.

9. On July 18, 2007, in the context of processing petition 478-07, the Commission received the State's response to the underlying petition, of which copies of the relevant parts were served upon the petitioners on July 24, 2007, in order to submit their observations on the State's brief within a period of one month.

10. On August 23, 2007, the petitioners filed their observations to the response of the State regarding ut supra. Furthermore, on August 27, 2007, the petitioners submitted their observations regarding the information submitted by the State on July 6, in the context of the request for precautionary measures.

11. On September 4, 2007, the Commission received new information submitted by the petitioners, which was forwarded to the State on September 11, 2007, reporting a worsening of the situation endangering the lives and physical integrity of the children incarcerated at the Provisional Detention Center of Guarujá, as well as the alleged inability of the Brazilian State to solve the serious situation of human rights violations of these inmates,.

12. On September 21, 2007, in the context of the request for precautionary measures, the State reports that the improvements to the Vicente Carvalho prison, attached to the 1st Police District of Guarujá, has been completed, so that all prisoners being held at the Provisional Detention Center of Guarujá –Annex 1- may be transferred to the Vicente de Carvalho prison and thus Annex 1 can be duly deactivated. By virtue of the above, the State moves that the request for precautionary measures be filed away or archived.

13. On October 17, 2007, in the context of the 130th Regular Session, the Commission decided to grant the requested measures to the children being held at the Provisional Detention Center of Guarujá[FN6].

[FN6] Accordingly, on October 26, 2007, the IACHR requested that the State of Brazil:

1. Adopt all of the measures required to ensure the lives and integrity of the children being held in the Provisional Detention Center of Guarujá.
2. Speedily transfer the children to a children's detention center, pursuant to the guarantee set forth in Brazilian legislation, Article 5(5) of the American Convention, and Art. 37.c of the Convention on the Rights of the Child.
3. Provide immediate medical and psychological care to the beneficiaries of the measures.
4. Immediately prohibit the entry of children to the Provisional Detention Center of Guarujá.

Additionally, the Commission required the State to submit information on compliance with said measures, within a period of 15 days.

14. On November 20, 2007, the State requested an extension of the 15 day period to submit to the IACHR information regarding compliance with the precautionary measures granted. Said request was granted by the Commission on November 29, 2007.

15. On November 27, 2007, the deaths of three adult inmates at the Provisional Detention Center of Guarujá, during an attempted escape were reported by the petitioners; detention conditions of inmates over 18 years of age at said prison were outlined; and an extension of the precautionary measures to protect the latter was requested.

16. On November 30, 2007, the Commission requested the petitioners to submit within a 15 day period, further information regarding the allegedly dangerous situation placing the adult detainees at risk at the Provisional Detention Center of Guarujá.

17. On December 12, 2007, the State requested a new extension of the 15 day period from the Commission to submit information regarding compliance with the precautionary measures granted in support of the children. On December 17, 2007, the Commission granted said request extending the period until January 3, 2008.

18. On December 18, 2007, the petitioners submitted the additional information requested by the IACHR, regarding detention conditions of adult inmates and their allegedly hazardous situation.

19. On January 3, 2008, the State submitted information in the context of the precautionary measures for the children being held at the provisional detention center.

20. On January 15, 2008, the Commission's decision to grant the request for extension of the precautionary measures in support of the adult detainees at the Provisional Detention Center of Guarujá[FN7] was communicated to the State.

[FN7] In said communication, the IACHR requested the State to:

1. Adopt any measures necessary to ensure the lives, health and the physical integrity of persons deprived of liberty at the Provisional Detention Center of Guarujá;
 2. Reduce overcrowding at the Provisional Detention Center of Guarujá to a level that makes it possible to ensure the lives and physical integrity of the inmates;
 3. Provide immediate medical care to all the beneficiaries;
 4. Coordinate actions taken in compliance with the precautionary measures in consultation with the representatives of the beneficiaries.
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21. On January 29, 2008, the State submitted a communication stating that on January 30, 2008, a meeting would be held with representatives of the Federal and State governments and the beneficiaries, to be able to ascertain actual conditions at the Provisional Detention Center of Guarujá. On February 4, 2008, receipt of said communication was acknowledged.

22. On February 15, 2008, the petitioners submitted information on the precautionary measures stating that the presence of children had been confirmed at the Provisional Detention Center. On February 21, 2008, the IACHR acknowledged receipt of the information submitted by the petitioners, provided a copy thereof to the State requesting the latter to submit information regarding compliance with the precautionary measures that had been granted, within a period of 7 days. On February 28, 2008, the State sent its observations to the Commission; the attachments thereto were received on March 4, 2008. On the same date, the State transmitted additional information on compliance with the precautionary measures in question, particularly on the working meeting held on January 30, 2008, among representatives of the federal and state governments and the petitioners, for the purpose of coordinating activities to correct the problems at the Provisional Detention Center of Guarujá.

23. On March 5, 2008, the Commission acknowledged receipt of the State's correspondence of February 28 and March 4, 2008, and sent it to the petitioners, requesting that they present their observations within 15 days. As requested, on March 18, 2008, the petitioners presented their observations on the State's correspondence to the Commission. On March 28, 2008, the Commission conveyed the petitioners' correspondence to the State, requesting that it present its observations thereon within 15 days.

24. On April 14 and 23, 2008, the State presented its observations as requested by the Commission. The Commission conveyed that correspondence to the petitioners on April 23,

2008, giving them a period of 15 days to present their comments on the information sent by the State.

III. POSITIONS OF THE PARTIES

A. Petitioners' Position

25. The petitioners allege that the State of Brazil violated the provisions of the American Convention on Human Rights, inasmuch as the obligation to respect and ensure the rights set forth therein was not observed, namely the right to life (Article 4), the right to humane treatment (Article 5), the rights of the child (Article 19) and the right to judicial protection (Article 25.1) in relation to non compliance with the obligations to respect and ensure human rights (Article 1.1).

26. The petitioners maintain that there is a problem of degrading conditions of detention at the Provisional Detention Center of Guarujá. According to the petitioners, the facilities in question, built during the 1970s, operate as an annex to the Police Headquarters of said locality. They state that the center has 10 cells, originally planned to lodge 60 persons. Each cell is 2.7 meters long by 4.5 meters wide, each one having one shower and one toilet. In addition to the 10 cells, the facilities have three other ones, one of which is used to house inmates under death threat by other inmates, measuring 1.5 meters long by 3 meters wide, and the other two being used to hold children, measuring 1.3 meters by 4.2 meters and 1.2 meters by 3 meters, each.

27. The petitioners state that despite the prison's maximum capacity of 60 inmates, there has been overcrowding, which has led to the deterioration of conditions at the prison facilities. These conditions were accounted for in the 2005 report of the Community Council on Prisons (Conselho Comunitario Penitenciario), confirming that the facilities might have been used to house up to 350 persons. They report that, subsequently the overcrowding had progressively decreased to 64 inmates by April of 2007; however, the petitioners claim in information provided on May 31, 2007, that 12 children on said occasion were being housed in a single cell with a maximum capacity of six persons. They allege that on December 6, 2007, the prison presented the problem of overcrowding, housing up to 147 detainees[FN8]. According to the petitioners, on March 10, 2008, the prison population was 19 adult prisoners and one detained child, but this number varied, since the flow of entering prisoners was irregular and the prison situation could change in a matter of days[FN9].

[FN8] "Relação de Presos Recolhidos na CP de Guarujá em 06.12.2007 – Quinta" [List of prisoners held at the Provisional Detention Center of Guarujá on Dec. 6, 2007 – Fifth], issued by the Secretariat of State for Public Security Affairs, on December 6, 2007, attachment 12 to the petitioners' correspondence of December 18, 2007.

[FN9] Petitioners' correspondence in the context of the precautionary measures, dated March 18, 2008, pp. 5 and 6.

28. As for overcrowding, the petitioners indicated that the main cause is the procedural delay in awarding liberty or progression to less restrictive regimes. They said that, according to the

Secretariat of Penitentiary Administration of the State of São Paulo, approximately 30% (thirty percent) of the prisoners at the Provisional Detention Center are entitled to promotion to the open or semi-open system or to parole[FN10].

[FN10] Petitioners' correspondence in the context of the precautionary measures, supra, note 9, p. 4.

29. The petitioners indicate that on October 2005, official expert engineer findings show that the overpopulation was a factor causing a variety of problems and violations at the Provisional Detention Center of Guarujá. Inspections conducted during 2006, as well as expert site visits by the Division of Public Health Enforcement of the Institute of Criminalistics in December of 2007 revealed that said conditions persist to that date.[FN11] Moreover, they add that the report of the Chief of Police in charge of the jail in question, prepared on December 7, 2007, states that "the inmates are subject to limited survival conditions, with the spreading of diseases and incalculable exposure to hazards." [FN12]

[FN11] Inspection report of the Division of Public Health Enforcement and Expert Inspections of the Institute of Criminalistics. Attachments 15 & 16 to the petitioners' letter of December 18, 2007.

[FN12] Report on the conditions of the Provisional Detention Center of Guarujá, prepared by the Chief of Police in charge, on December 7, 2007. Attachment 17 to the petitioners' letter of December 18, 2007.

30. Furthermore, it is claimed that members of rival criminal factions are being held in said establishment, which generates a climate of permanent tension and insecurity. Detainees, who are followers of the minority faction, are held in a different cell the whole time, separated only by an iron gate and receive death threats. The petitioners indicate that said situation, as well as the risk of attempted rescues of inmates from the jail by the majority criminal faction, known as el Primer Comando de la Capital or the "First Commando of the Capital" was reported by the Permanent Judge to Monitor Prisons and the Judicial Police.[FN13]

[FN13] Decision of the Permanent Judge to Monitor Prisons and the Judicial Police, of December 7, 2007, regarding Administrative Injunctive Proceeding No. 80/07. Attachment 19 to the petitioners' letter of December 18, 2007.

31. Additionally, and in light of the abysmal health and sanitary conditions, the facilities are infested with rats and all types of insects. According to the information provided, it is alleged that in the context of the request for precautionary measures, children were compelled to stop up the latrine hole with a bottle to keep all manner of insects from getting inside and used cold water from a hose inside the cell to wipe themselves. The petitioners add that, in the face of said

conditions of detention, children show stomach problems, skin diseases and are at risk of becoming infected with leptospirosis.

32. They also indicate that even the most minimal safety conditions such as fire-fighting equipment are lacking, and the electric fixtures might have deteriorated as a result of the overcrowding mentioned earlier. According to the petitioners, the cells present inadequate ventilation and lighting, and contain reinforced concrete beds, the metal inside of which is used as a source to make cutting instruments. They also add that the jail is not equipped with enough sanitation system capacity, thus generating sewage problems and environmental pollution. Moreover, they allege that understaffing in the infirmary have give rise to a lack of proper health care. It is also stated that there exists a problem of cruel and inhumane treatment of inmates, both with adults as well as with children and young people, not to mention specific acts of violence. Additionally, it is argued that overcrowding and dreadful physical conditions at the jail breed an environment favoring disasters and the spreading of infectious contagious diseases.

33. The petitioners allege that detainees possess weapons. They indicate that during the period from February 9, 2007 to November 26, 2007, as a result of searches conducted at the jail, home-made knives of varying sizes, fan blades, sawing tools, scissors, metal and wooden bars, a metal-pointed wooden device, metal chains, concrete rocks and other puncturing and cutting instruments were confiscated from inmates at the Provisional Detention Center of Guarujá. On November 12 and 26, 2007, 4 (four) firearms and intact ammunitions cartridges were found in the possession of detainees.[FN14]

[FN14] Attachments 1 to 13, Petitioners' letter of December 18, 2007.

34. The petitioners state that on April 5, 2007, a prison break took place, with 16 inmates fleeing. In information submitted by the petitioners it is confirmed that the inmates were carrying firearms during the escape.

35. The petitioners indicate that, on November 26, 2007, another escape incident took place, in which three adult inmates were killed, after an alleged shoot-out with police officers. The petitioners use the aforementioned incidents in order to demonstrate the existence of firearms at the hands of the detainees, which would aggravate the insecurity in the detention center.

36. The petitioners assert that no improvements have been made to the prison facilities, despite the high number of complaints and court actions intending to correct the problem.

37. They claim that the children housed at the Provisional Detention Center of Guarujá have remained at the facilities for nearly 4 months in abysmal conditions, with serious threats to their lives and personal integrity. They further state that the report of the Community Council on Prisons or CCP, from the Portuguese acronym (Conselho Comunitario Penitenciario), dated September 12, 2006, recounts that after a site-visit conducted on June 27, 2006, it was verified that children would stay up to 120 days at the Center, with all of them being held in a single cell designed to hold up to six persons. According to the petitioners, the CCP states in its report,

without providing further details, that it had previously confirmed “the incarceration of two girls in a makeshift cell [at the Provisional Detention Center of Guarujá][FN15], which is supposed to be for the detention of prisoners caught in the act of commission of a crime (flagrante delicto).”[FN16] The petitioners add that in May of 2006, the CCP assisted a girl, who was under arrest and being held at the prison at issue for three days “in a total state of despair.”[FN17] The petitioners claim that said Council spotlights a serious problem regarding the detention of girls at the Provisional Detention Center of Guarujá, in light of the fact that there is no proper place to house them at this jail.[FN18]

[FN15] The original text in Portuguese refers to girls between 12 and 18 years of age. See reference No. 21.

[FN16] Informe del Consejo Comunitario Penitenciario de Guarujá y Vicente de Carvalho [Report of the Community Council on Prisons of Guarujá and Vicente de Carvalho], dated September 12, 2006. Petitioners’ letter of May 8, 2007, attachment 16.

[FN17] Minutes of the meeting of the Consejo Comunitario Penitenciario de Guarujá y Vicente de Carvalho, dated May 23, 2006. Petitioners’ letter of May 8, 2007, attachment 11.

[FN18] Minutes of the meeting of the Consejo Comunitario Penitenciario de Guarujá y Vicente de Carvalho dated May 23, 2006. Petitioners’ letter of May 8, 2007, attachment 11.

38. In December of 2007, the petitioners pointed out that children continue to be remanded to the Detention Center of Guarujá, remaining at that jail until being transferred to facilities belonging to the CASA Foundation[FN19]. Therefore, since this institution does not take in any new inmates over weekends or on holidays, if the admission or placement at the Provisional Detention Center of Guarujá takes place on any of these occasions, children need to wait at least three days or until the holiday is over to be transferred to the CASA Foundation. This situation was again reported in the petitioners’ correspondence of March 18, 2008, in which they said that a child had been held in that jail from January 29 to February 13, 2008, awaiting transfer to a detention center appropriate for his age.

[FN19] Based on Law 12.469, of December 22, 2006, and pursuant to Article 1 thereof, “the FEBEM [Fundação Estadual del Bienestar del Menor de São Paulo or ‘State Foundation of Juvenile Wellbeing of Sao Paulo’] shall now be called Fundação Centro de Atención Sócio-Educativa al Adolescente or ‘Center for Socio-Educational Adolescent Care Foundation’–Fundación CASA”. See full text of law available at the Website Portal: http://www.al.sp.gov.br/staticfile/integra_ddilei/lei/2006/lei%20n.12.469,%20de%2022.12.2006.htm. In this report, the Commission uses both expressions to refer to the body charged with implementing socio-educational measures under the “Estatuto da Criança e do Adolescente” (ECA).

39. The petitioners assert that children are not kept apart from adult inmates, and are also prevented from exiting their cell, even to satisfy their physiological needs, to eat, take in fresh air or to have access to education. They are forced to defecate and urinate in plastic bottles that are

subsequently retrieved by prison staff, all in the same cell where they are lodged and receive their meals.

40. The petitioners argue that different judicial measures have been attempted since 1999 to turn conditions around at the prison, namely, Public Civil Actions ACP N° 2250/1999, N° 518/2002, N° 551/2003, and N° 843/2004. Even though some of these legal actions were deemed to be legitimate, nothing must have been done, according to the petitioners, to implement them.

41. The petitioners further state that the Public Prosecutor's Office brought Public Civil Action ACP N° 2250 of 1999 against the State of Sao Paulo and the Fundação Estadual del Bienestar del Menor de São Paulo or State Foundation for Juvenile Wellbeing, (hereinafter, the FEBEM), with the Children's and Juvenile Court of Santos, to get the State to adopt measures aimed at putting the care of children in the hands of the municipality, adopting guidelines to build youth facilities in the region, so that holding children for more than 5 days at the Provisional Detention Center of Guarujá would be avoided. This motion was granted on July 29, 2004; nonetheless, the State appealed the decision, which has yet to be ruled upon as of the date of this report.

42. The Office of the Public Prosecutor, likewise, brought Public Civil Action ACP N° 518 of 2002 against the State of Sao Paulo and the FEBEM, with the Children's and Juvenile Court of Guarujá. The suit, whose purpose it was to secure the transfer of the children being held at the Provisional Detention Center of Guarujá once they had been held there for 5 days, was ruled to be legitimate on August 9, 2006, and is pending a ruling on the appeal filed by the State.

43. The Office of the Public Prosecutor, likewise, brought Public Civil Action ACP N° 551 of 2003 against the State of Sao Paulo and the FEBEM, with the Children's and Juvenile Court of Guarujá. The suit, whose purpose it was to secure the transfer of the children being held at the Provisional Detention Center of Guarujá once they had been held there for 5 days, was ruled to be legitimate on August 9, 2006, and is pending a ruling on the appeal filed by the State.

44. Furthermore, the petitioners add that Public Civil Action ACP N° 843 of 2004, was filed by the Office of the Public Prosecutor against the State of Sao Paulo, and seeks to reduce the total number of the inmate population at the penitentiary to 120, twice its capacity. The suit was adjudged to be legitimate on December 22, 2006, and is pending a ruling on the appeal filed by the State.

45. In its observations to the State's response, dated August 27, 2007, the petitioners clarified that the above-listed legal actions have been pending before the court for more than eight years. The petitioners further state that during this time period the State has received sufficient notice of the human rights violations taking place at the Provisional Detention Center of Guarujá, including by means of the aforementioned law suits, without any effective measures been taken in this regard, therefore proving the ineffectiveness of the judicial protection charged in this petition.

46. Furthermore, and relating to the State's allegations concerning the intervention of CASA Foundation in order to presumably remedy the situation of overcrowding, the petitioners stated

that participation of said institution was limited to signing a memorandum of intent with the Office of the Mayor of Guarujá to build an holding facility for intake [of juvenile inmates]. The claim was also made that the Office of the Public Prosecutor might have indicated that said memorandum might face difficulties in being implemented, because of the fact that the area slated for construction of the facilities may be subject to a historic value assessment process instituted by the Council for the Defense of Historical, Archeological, Artistic and Tourist Heritage Sites of the State of Sao Paulo (CONDEPHAT, known by the Portuguese acronym). It is additionally pointed out that the Secretary for Social Action stated that construction of the holding facilities for intake under discussion would not get under way until 2008.[FN20]

[FN20] The newspaper article supporting the aforementioned public statements is attached hereto.

47. In their correspondence of March 18, 2008, concerning the precautionary measures, the petitioners said that the first working meeting with the State had been held three months after those measures had been granted, and that the majority of the officials present took cognizance of the content of the measures during the meeting. The petitioners also indicated that those public agents did not have the decision-making authority to order compliance with the measures suggested by the petitioners, which made it difficult to pursue the purpose of the meeting. At the meeting, according to the petitioners, the State representatives concluded that it was impossible to transfer the prisoners from the Provisional Detention Center of Guarujá to jails in other cities of the region, which were also overcrowded. In the same correspondence, the petitioners allege that, despite the efforts of the State to comply with the precautionary measures granted, these had not yet been effectively implemented, and it was necessary to keep them in effect. Regarding medical attention, the petitioners said that the State had entirely failed to comply with that measure. They said that, during their visit on February 28, 2008, they had found that the jail lacked medical care infrastructure and health professionals.

48. The petitioners maintain that all admissibility requirements have been fulfilled, and that this case qualifies for the exception provided in the rules of procedure for exhaustion of domestic remedies, in light of the unjustified delay that ruling thereon may involve. They claim that there is sufficient merit to rule that the elements are present to find violations of the rights enshrined in Articles 4, 5, 19 and 25 of the American Convention, in relation to Article 1(1) of the same instrument.

B. State's Position

49. In the State's letter dated July 18, 2007, firstly, it questioned the time period it was granted by the Commission to submit its response. The basis for said position is the summary nature of the proceeding, which might have been supported by the unilateral nature that the amendments to the rules of procedure of the Commission would have, inasmuch as the General Assembly did not give its approval [to the amendments]. The state further claims that abbreviating said proceedings would also put in jeopardy the principles of cross-examination or the right to confront witnesses and the right to put on a defense, because the proper way to

proceed in urgent cases in which there may be a risk of violations of human rights would be the process of request for precautionary measures and not the one adopted by the Commission in this situation.

50. The State deems that it is improper to proceed to hear the petition under consideration being that domestic remedies have not been exhausted, as four Public Civil Actions are pending, the purpose of which would be to provide a solution to the existing conflicts at the Provisional Detention Center of Guarujá. Said proceedings were found to be legitimate and were submitted to a second level of review by the courts, a basic principle of a Democratic State under the Rule of Law, and are currently being heard by the Tribunal of Justice of Sao Paulo.

51. The State asserts that there is no reason to find that there has been an unjustified delay in hearing the above-cited lawsuits, inasmuch as proceedings of such a magnitude cannot be expected to be adjudicated in an excessively swift manner.

52. Additionally, the State believes that the petitioners' demands are part of the purpose of the legal actions instituted in the domestic legal system, despite the fact that the inmates from the Provisional Detention Center of Guarujá might have opted to immediately resort to the Inter-American System instead of awaiting a settlement of the dispute in the domestic arena, a strategy which, according to the State's claim, has been rejected consistently by the Inter-American Court of Human Rights (hereinafter referred to as "the Inter-American Court" or "the Court").

53. Furthermore, in a letter dated July 18, 2007, the State asserts that, despite the fact that a final judgment has not been handed down yet regarding the issues at hand, and echoing its arguments previously set forth during the proceedings of the request for Precautionary Measures linked to the petition, they would be implementing several different courses of action to solve the existing problems with detention of children being housed at the Provisional Detention Center of Guarujá. Moreover, the assertion is made that the memorandum of intent was entered into between the CASA Foundation, the agency responsible for implementation of socio-educational measures for children, and the Office of the Mayor of the Municipality of Guarujá, which was the product of meetings attended as well by the Office of the Public Prosecutor for the construction of juvenile intake/holding facilities in the region, in order to resolve existing problems when taking children into custody.

54. The State, in information submitted in the context of processing the request for precautionary measures dated July 6, 2007, lists as difficulties hampering implementation of the intake facilities for children in the region, inter alia: 1) the need for coordinated efforts between the State and Municipal governments in building the facilities; 2) the lack of local community support, particularly from municipalities; 3) constraints on the public budgets of the State and Municipality; and 4) the need to secure environmental certification to build the facilities, which requires a prior preparation of an environmental impact study. It claims on the same occasion that joint efforts are being made with entities of the State of Sao Paulo and the Municipality of Guarujá, as well as the effective participation of the Office of the Public Prosecutor and the Judiciary, with regard to custody of the child offenders. The State further argues that the legal authority of the CASA Foundation is restricted to execution of socio-educational measures mandated by court order, and does not extend to provisional custody of children charged with

violations of the law. Nevertheless, the State alleges that said institution might have intervened in an effort to find a solution to the problem of prison overcrowding with regard to children.

55. Lastly, the State believes that, based on the allegations set forth, that the petition filed should be found to be inadmissible, inasmuch as domestic remedies have not been exhausted as provided by Article 46(a) of the American Convention.

56. In the context of the request for precautionary measures, in its letter dated September 20, 2007, the State reports completion of improvements to the Vicente Carvalho Jail, annex to the First District Police Station of Guarujá, to which all inmates being held at the Provisional Detention Center must be transferred as the latter will be put out of commission at the appropriate time. Furthermore, despite understanding the concern of the petitioners, which is so reflected in the precautionary measures regarding conditions at the Provisional Detention Center of Guarujá, the State maintains that there is no urgency or risk of imminent personal and irreparable damage to provide a basis for the request for precautionary measures.

57. On January 3, 2008, in the context of the precautionary measures granted to the children and juveniles being held at the provisional detention center, the State indicates that the cell that houses the children, despite being located in the same building as the Guarujá Police Headquarters, is located away from areas of the prison used for incarceration of adults. Furthermore, the separation of adults and children is rigorously maintained by state authorities. Additionally, the State underscores the fact it has completed improvements at the Vicente de Carvalho Jail, which would include four cells to be used to house children, though as of this date their transfer to said detention unit has not proceeded. The State reiterates, moreover, that it has concluded the reform in four cells of the Vicente de Carvalho Jail, attached to the Provisional Detention Center of Guarujá, which cells would be used to hold detained children until their transfer to a CASA Foundation facility.

58. In its correspondence of February 28, 2008, the State reaffirmed that the children detained at the Provisional Detention Center were held in separate cells and not cohabiting with adult prisoners. The State also indicated that medical attention had been provided regularly to the persons deprived of liberty in each jail, in the form of two weekly visits by a physician and three visits, in the same period, by a nurse.

59. Lastly, in its correspondence of April 14, 2008, the State reported that, under an order by the Secretary of Public Security of the State of São Paulo, the Provisional Detention Center of Guarujá no longer held detainees as of March 12, 2008. The provisional prisoners previously held at that jail had been taken to the public jail attached to the 5th police district of Santos.

IV. ANALYSIS OF ADMISSIBILITY

A. *Rationae personae, rationae materiae, rationae temporis, rationae loci* Jurisdiction

60. Pursuant to Article 44 of the American Convention and Article 23 of the Rules of Procedure of the IACHR, the petitioners, in their capacity as legally recognized non governmental entities, have standing to file petitions with the Commission regarding potential

violations of the rights enshrined in the American Convention. Furthermore, the Federative Republic of Brazil has been a party to the American Convention since September 25, 1992.

61. The Commission considers that children[FN21] to be alleged victims who are adversely affected by existing conditions of imprisonment at the Provisional Detention Center of Guarujá, State of Sao Paulo, as of the time the first public civil action was filed on their behalf (ACP N° 2250) (supra paragraph 41) in 1999 until the present time. Moreover, the Commission considers the adults and young people being held under the conditions of imprisonment at the detention center cited above as alleged victims, as of the time the first motion was filed in domestic courts concerning the conditions of detention at the provisional center, in 2004, that is, Public Civil Action ACP N° 843 (supra paragraph 44), up to the present date.

[FN21] The American Convention on Human Rights does not define who children are. Therefore, the Inter-American Human Rights System applies the concept as established in International Law, in the United Nations Convention on the Rights of the Child, which defines a child as “every human being under the age of eighteen years, unless under the law applicable to the child, majority is attained earlier.” Furthermore, Article 27 of the Criminal Code of Brazil provides that: “minors under 18 (eighteen) years of age shall not be held criminally liable, and shall be subject to provisions established in special legislation”. Article 2 of the Statute of the Child and the Adolescent of Brazil sets forth that “for the purposes of this law, persons up to twelve years of age but prior to turning that age are considered a child and between twelve and eighteen years of age are considered an adolescent”. The Commission, in following the provisions of the Convention on the Rights of the Child, uses the term “children” in this report to refer to the alleged victims who were under 18 years old at the time of their detention at the Provisional Detention Center of Guarujá.

62. Based on the information provided by the petitioners, the Commission was able to identify the following children inmates: A.P.B.N., A.V., A.G.S., A.N.R., A.A.S.R., A.C.O., A.S.B., A.A.F., A.P.B.F., B.G.S., B.S.L., B.F.S., B.N.G., C.J.F., C.M.F., D.S.J., D.C.C., D.G.S., D.B.S., D.S.N., D.F.B., D.M.P., D.S.S., E.T., E.B.A, E.F.M., F.C.C., F.F.S.S., F.G.A., F.S.B., G.S., H.C.A., H.B.O., J.B.O.C., J.L., J.S.M., J.V.S.J., J.M.R., J.L.N.V., J.M.P.S., J.R.R.S., J.B.C.S., J.L., L.F.S., L.A.E.S., L.O.F., L.G.L., L.C.S., L.L.O., L.P.V.A., L.C.S.C., L.F.P.P., L.G.C.B., L.F.P.P., M.S.C.P., M.P.B.S., O.B.M.S., P.R.S.S., P.M.M., R.T.R., R.N.B., R.J.S., R.S.S., R.S.S.M., R.M.P., R.S.P., V.R.C., W.O.F., W.A.A., W.R.J., W.N.M., W.A.Q., W.N.R., W.B.F., W.M.P. & W.S.C.

63. Furthermore, the following adults and young people being held at the Provisional Detention Center were identified: Adalberto Neto, Adalton (Adauton) de Oliveira Pereira, Ademir Rodrigues, Adenilton Souza de Araújo, Adilson Peixoto da Silva, Adonildo Araújo dos Santos, Adriano Evandro Fernandes, Adriano Pinto de Andrade, Alex dos Santos Gomes, Alex Santana da Silva, Alessandro Almeida Lima, Alessandro de Jesus Santana, Alexandre Barros Neves, Alexandre José da Silva, Alexandre Tomaz Firmino, Alexandre de Lima Silva, Alexandre Rodrigues de Araújo, Alexandre Mendes Duarte, Alexsandro Silva Santos, Anderson de Jesus Gonçalves, Anderson da Silva Santos, Anderson Neres Borges, André Bispo dos Santos, André

Lorenço dos Santos de Jong, André Luiz Fernandes Romano, André Luis Ferreira Estácio, André Rubens dos Santos, Adriano da Silva, Ari Santos da Silva, Aurélio Pedro dos Santos, Avenicio de Oliviera Marcos, Bruno de Freitas, Bruno Eduardo Santos Campos, Bruno Luiz Zaparoli, Bruno de Oliveira Candido, Bruno Francisco da Silva, Bruno Santos Andrade, Camilo de Souza Lima, Carlos Alberto de Lima, Carlos Alberto Souza Oliveira, Carlos Alberto Sittino dos Santos, Carlos André Batista, Carlos Eduardo Dias, Cláudio Roberto Possidonio da Silva, Cleber Fernando Lopes de Souza, Cristiano da Silva, Cristiano Pinheiro Machado, Daniel da Silva, Daniel Silva de Oliveira, Danilo Barbosa Moreira, Danilson Aparecido Gama dos Santos, David Alexandre de Jesus Martins, David de Souza, Dener Furtado Portela, Denis Manoel Xamber, Deigo Oliveira de Souza, Diego Pinheiro Brasseroto, Diogo Antonio Moreira do Amaral, Diogo Aparecido dos Passos Tomaz, Diogo Felipe, Diogo Henrique de Souza, Diogo Santana Rocha, Dionísio Alves Albino, Domingos Silva do Nascimento, Douglas Santos Barros, Douglas Henrique Silva Brito, Edcarlos Morais, Eder Luiz Batista Candido, Éderson Leandro Nascimento, Éderson Passos dos Santos, Edílson Alves dos Santos, Edílson dos Santos, Edinaelto José dos Santos, Ednaldo Alves da Silva, Ednaldo Nascimento, Ednaldo Rodrigues Santos, Edson Prieto Mota, Eduardo Barbosa Nazareth, Eduardo de Almeida Fortes Junior, Eduardo Souza Oliveira, Eduardo Oliveira Costa, Edvaldo Santana Lima, Elias Brito de Andrade, Elidio Nascimento Apolinário, Emanuel Julio Cabral, Ercilas Gonçalves Prieto, Elizeu de Lima, Estefano da Silva Nascimento, Evandro da Silva Batista, Evandro Luiz de Campos Santana, Everson Ferreira Santiago, Ewerton dos Santos Luiz, Ezequias Rocha Santana, Fabiano Justino Borges, Fabio da Silva Amaral, Fabio dos Santos Paixão, Fabrício Assis Santos, Fabrício de Jesus Andrade, Fabrício Pereira dos Santos, Fabrício Ribeiro dos Santos Santana, Fausto Anacleto da Silva, Felipe (Fernando) Gouveia Moura, Fernando Almeida de Lima, Fernando Francisco Ambrosio, Flavio Anacleto dos Santos, Flavio Antonio Rocha Pio, Flavio Henrique de Medeiros, Flavio Silva dos Santos, Francisco Clodoaldo de Oliveira Ramalho O., Francisco José Santos de Andrade, Francisco Sales Xavier, Franklin Barbosa Germano, Gabriel G. Saldanha Fonseca, Geciberto Antonio Valério dos Santos, Geovane Wagmaker (Wagmacker) de Almeida, Gilberto de Andrade, Giovanni Alves de Almeida, Gilson Viana dos Santos, Humberto dos Santos Barbosa, Hudo Marcio Monteiro Silva, Isaac da Silva Santos, Israel de Oliveira Rodrigues, Ivanildo Araújo de Souza, Ítalo Rodrigues de Souza, Jean Paulo da Silva, Jean Magno Dantas (Jonata Marconde), Jefferson Barbosa Campos, Jefferson Santos Souza, Jensler Artumduaga Ruiz Gardino, João Luiz de Souza, Jocivaldo Reis Pereira de Souza, Joelson Belmiro dos Santos, Joelson Modesto, Joie de Souza, Jonathan Ludini Barbosa Silva, Jonathan Rodrigues de Oliveira, Jonas de Souza Ângelo, José Andrade de Oliveira Silva, José André Guimarães, José Carlos Alves (Medeiros), José Carlos Firmino Varela, José Carlos Nixford dos Santos, José Carlos dos Santos, José Cristiano de Barros, José Cristiano de Melo, José da Silva, José de Souza Ferreira, José Eliomar Tabosa, José Flávio Eleutério da Silva, José Joaquim da Silva, José Maria de Oliveira Almeida, José Raimundo Rabelo, José Ricardo de Oliveira, José Roberto Evangelista da Silva, Josemir Santana, Josivan da Costa Moreira, Juarez Rabelo, Kleber Augusto Rodrigues Natalli, Leandro Henrique dos Santos, Leandro Oliveira Ferreira, Leonardo Augusto Silva Jorge, Leonardo Pimenta de Oliveira, Leonildo Luiz Barbosa, Liverio dos Santos, Lourenço Serafim da Silva, Lucas Fernandes Arias, Lucas Nogueira de Freitas, Luciano Costa Alves, Luciano Trajano, Luiz Alberto Coccinelo, Luiz Antonio Francisco Menezes, Luiz Carlos da Silva, Luiz Felipe Santos Bento, Luti Francisco da Cruz, Maicon Almeida Azevedo, Maicon Michel Barbosa Fernandes, Marcelo Correia da Rocha, Marcelo de Oliveira Santos (Luciano), Marcelo Renato Campos, Marcilio Marcos da Silva Mariano, Marcio Gomes dos Santos, Marcio Messias dos

Santos, Marcio Nunes Silva, Marcio R. Campelo, Marcos Antonio Tochi, Marco Aurelio de Souza, Marcos Vinicius Fonciano, Marcus Vinicios Nunes Pereira, Mario José de Freitas Junior, Mauricio Vilela dos Santos, Maxwell Ferreira de Lima, Michael Gomes, Michael Alves da Silva, Michael dos Santos Mazan, Milton Boaventura Gomes, Milton Thimoteo de Oliveira, Moacir Gomes, Natanael da Conceição, Nelson da Costa, Nilson Neres de Jesus Santana, Nilton Bispo dos Santos, Nilton Rosa dos Santos, Odenivaldo dos Santos, Osvaldo Cruz, Osvaldo Fermoselli Rodrigues Junior, Otavio dos Santos Silva, Paulo Diniz Batista, Paulo Rodrigues Bartorillo, Paulo Rogério da Silva Peres, Paulo Roberto Furini, Paulo Roberto Marques Valente, Paulo Sergio Silveira, Paulo Sergio Teixeira da Silva, Paulo Vitor Coelho Chaves, Rafael Barbosa Campos, Rafael da Silva, Rafael Domingos (Domingues) Souza, Rafael Gomes Uchoa, Rafael Leonardo dos Santos, Rafael Machado Malaquias, Rafael Mauricio Modesto Lima, Rafael Moreira da Silva, Rafael Santos de Almeida, Raul Assumpção da Cruz, Reinaldo Antonio do Nascimento, Renato Arias Figueiredo, Renato da Silva Pinto, Renato Gutierrez Lopes (Junior), Ricardo Barbosa de Aguiar, Ricardo de Oliveira Santana, Ricardo do Nascimento Batalha, Ricardo Lima, Robson Pérez Reis, Robson da Silva Nascimento, Robson Santana Andrade, Rodrigo Carrara Silveira Luciano, Rodrigo da Silva Nascimento, Rodrigo Martins dos Santos, Rodrigo Menezes Vieira, Rodrigo do Nascimento, Rodrigo Santos do Nascimento, Rodrigo Sutil Costa, Rogério de Jesus Martins, Rogério Batista Sales, Rogério Carmelito dos Santos, Rogério Santos Silva, Ronaldo da Silva, Ronaldo dos Santos, Roniel da Silva Cerqueira, Rudenis dos Santos, Samuel Albuquerque Junior (Nunes), Sandro Carlos Oliveira, Sebastião Mendes de Aquino, Sergio Ribeiro Leal Junior, Sergio Ricardo da Cruz Borba, Silvio Luiz Pereira, Silvio Nascimento dos Santos, Sival Pereira de Jesus (Leandro), Theylor Ramos, Thiago Camargo Batista, Thiago Moura de Souza, Thiago de Jesus Paiva, Tiago Aparecido Rolins, Tiago da Silva Paulino, Ubirajara Lopes dos Santos, Valdeci Teixeira, Valter de Oliveira Junior, Valter Silveira, Vitor dos Reis, Wagner Alberto Abdalla Camargo, Wagner Aparecido Andrade, Wagner Francisco, Wagner Gomes Santos, Wagner Santana Rafael, Wellington Ribeiro da Silva, Wellington (da) Silva Sampaio, Wellington Thiago da Silva Veleda, Willian de Oliveira Costa, William de Souza, Willians Santos do Rosário and Wilson de Melo Santos.

64. This list was drawn up for purposes of admissibility of the petition, and may be expanded to include other persons who meet the requirements set forth in this petition.

65. *Rationae materiae* jurisdiction stems from the fact that the charges are tantamount to alleged violations of the human rights protected by the American Convention and, based on the principle of *iura novit curia*, by the Convention of Belem do Para. There is clearly *rationae temporis* jurisdiction, inasmuch as the alleged violations occurred at a time when the State's obligation to respect and ensure the rights enshrined in the American Convention was in effect, that is, subsequent to September 25, 1992, as well as the Convention of Belem do Para, ratified by the State on November 27, 1995. Lastly, the Commission has *rationae loci* jurisdiction, inasmuch as the alleged acts took place on territory of the Federative Republic of Brazil, a country that ratified the American Convention.

B. Admissibility Requirements

1. Exhaustion of domestic remedies

66. In accordance with Article 46(1) of the Convention, in order for a petition to be admitted by the Commission, remedies under domestic law must have been exhausted, in accordance with generally recognized principles of international law. In section 2 of said Article, it states that those provisions (section 1) shall not be applicable when the domestic legislation of the state concerned does not afford due process of law for the protection of the right in question, or if the alleged victim of the violation of the right has been denied access to the remedies under domestic law, or if there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

67. The petitioners state that there has been ineffectiveness and unwarranted delay in processing domestic remedies, inasmuch as more than eight years have transpired (supra paragraph 38) from the time the first Public Civil Action (ACP N° 2250) was filed seeking to separate children and adults. Moreover, more than three years have transpired from the time the appeal was filed by the State of Sao Paulo against the first judgment, in the context of ACP N° 2250, on July 29, 2004, wherein it was ordered to take measures to build appropriate units for children in the region of “Baixada Santista”, in sufficient amount and respecting the principle of human dignity, until the time this report was prepared. Likewise, in the other Public Civil Actions (ACP N° 518 & ACP N° 551) (supra paragraphs 42 & 43), relating to the children deprived of liberty at the Provisional Detention Center of Guarujá, decisions on the appeals filed by the respondents beginning in September of 2006, have yet to issued, while no measures aimed at correcting the alleged violations of human rights have been adopted as of this date.

68. Additionally, the petitioners assert that Public Civil Action (ACP N° 843) regarding the conditions of persons deprived of liberty at the Provisional Detention Center of Guarujá, brought by the Office of the Public Prosecutor has been awaiting final disposition since 2004 (supra paragraph 44). Said legal action is intended to reduce the number of inmates of the jail in question to a maximum of 120 (one hundred and twenty) persons, in other words, double its alleged capacity. Accordingly, the petitioners argue that the remedy is ineffective and inadequate to repair existing conditions at the penitentiary. Furthermore, after an initial favorable judgment that was issued ordering the reduction in the number of inmates, appeals filed by the State of Sao Paulo and the CASA Foundation have not been decided to date.

69. The State for its part, argues that there is no unwarranted delay in processing the above cited actions, as it is necessary to take into account the complexity of the subject matter they involve (supra paragraph 51). It further believes that efforts aimed at solving this issue are being made, such as signing the memorandum of intent between the CASA Foundation and the Mayor’s Office of the Municipality of Guarujá (supra paragraphs 53, 54 & 56).

70. With regard to the exception to exhaustion of domestic remedies, it must be noted, in accordance with the requirements for the burden of proof in this subject matter, that a State alleging non exhaustion must show what domestic remedies must be exhausted and provide evidence regarding their effectiveness.[FN22] In the case at hand, the State does not introduce sufficient elements of proof regarding effectiveness of remedies pursued, and simply states that the delay would be justified due to the magnitude of the proceedings involved.

[FN22] IACHR, Report N° 69/05, petition 960/03, Admissibility, Ivan Eladio Torres, Argentina, October 13, 2005, paragraph 42; IA Court HR, Case of Ximenes Lopes, Judgment of November 30, 2005. Series C N° 139, paragraph 5. Case of the Community of Moiwana, Judgment of July 15, 2005. Series C N° 124, paragraph 49. Case of the Serrano Cruz Sisters, Judgment of November 23. Series C N° 118, paragraph 135.

71. The Commission notes that the prior exhaustion of domestic remedies requirement is related to the ability of the State to investigate, prosecute and punish potential violations of human rights, by means of domestic judicial bodies, as well as – particularly in cases such as this one related to conditions of detention – to offer mechanisms of precautionary control of the conditions of detention, prior to instituting an international proceeding. The prior exhaustion of domestic remedies requirement presupposes, nonetheless, that there exists at the domestic level due process of the law and that the domestic remedies are effective, because, otherwise, the Inter-American Commission, in accordance with Article 46(2)(a) of the Convention, may hear the case prior to exhausting remedies of domestic law.

72. The exceptions provided for in Article 46(2) of the Convention seek to ensure international legal action when remedies of domestic law and the domestic court system itself are not effective or available to ensure respect for the human rights of the victims.

73. The Court has stated that generally recognized principles of international law refer both to domestic remedies formally existing and remedies being adequate to repair the infringed legal situation, as well as being effective to produce the result for which they were designed.[FN23] For these reasons, their exhaustion must not be understood as the need to mechanically engage in a procedure of a formal nature; instead, the ability to actually obtain reparation must be examined on a case-by-case basis.[FN24]

[FN23] IA Court of H.R., Case of Velásquez Rodríguez. Judgment of July 29, 1988. Series C No. 4, paragraphs 62-66. Case of Fairén Garbi & Solís Corrales, Judgment of June 26, 1987. Series C No. 2, paragraphs 86-90. Case of Godínez Cruz, Judgment of January 20, 1989. Series C No. 5, paragraphs 65-69.

[FN24] IA Court of H.R., Case of Velásquez Rodríguez, supra note 24, paragraph 72. Case of Fairén Garbi & Solís Corrales, supra note 24, paragraph 97; Case of Godínez Cruz, supra note 24, paragraph 75.

74. Additionally, the Court has said that remedies are illusory when proven to be useless in practice, when the Judiciary lacks the necessary independence to render impartial decisions, or the means to execute the decisions issued therein are lacking. In addition to all of the foregoing instances, there could also be denial of justice, unwarranted delay in issuing decisions and impeding access of the alleged victim to the judicial remedy.[FN25]

[FN25] IA Court of H.R., Case of Ivcher Bronstein. Judgment of February 6, 2001. Series C No. 74, paragraph 137.

75. The bodies of the system cannot allow delay to block access for the Inter-American system to provide human rights protection to rights enshrined in the Convention.[FN26] It is in this body that mechanisms of international protection, such as the exceptions set forth in Article 46(2) of the Convention, among others, should be applied.

[FN26] IA Court of H.R., Case of Godínez Cruz, *supra* note 24, paragraph 95.

76. Pursuant to the violations charged and the judicial remedies pursued in this context, particularly considering the time period that has elapsed since the public civil actions were filed and the worsening of the situation of the persons deprived of liberty at the Provisional Detention Center of Guarujá, the Commission concludes that the petition under consideration is admissible under the exceptions set forth in Article 46(2), letters (a) and (c), of the American Convention. In this connection, the Commission reiterates what has been decided in similar cases concerning the same remedies in Brazil, particularly the Public Civil Action (actions lodged in 1999, 2002, 2003 and 2004), that the amount of time since the events began to be reported, without any available remedy having been resolved to date, indicates that in this situation there has been an unjustified delay. Moreover, it has not been demonstrated in this case that the Public Civil Action was, in practice, an effective remedy to address purportedly inadequate conditions of detention and to prevent alleged human Rights violations related to inhuman conditions of detention; therefore, it seems that remedies under domestic jurisdiction show little prospect of success[FN27].

[FN27] IACHR, Report N° 36/07, Petition 1133-06, Admissibility, Persons deprived of liberty in cells of the 76th Police Station of Niterói, Rio de Janeiro, Brazil, July 17, 2007, para. 108; and IACHR, Report N° 39/02, Case 12.328, Admissibility, Adolescents in custody of FEBEM, Brazil, October 9, 2002, para. 37.

77. Finally, the Commission reiterates that invocation of the exceptions to the rule of exhaustion of domestic remedies set forth in Article 46(2) of the Convention is closely linked to the determination of possible violations of certain rights contained therein, such as the guarantees of access to justice. However, because of its nature and purpose, Article 46(2) is a norm of autonomous content as opposed to the substantive norms of the Convention. Therefore, the determination as to whether the exceptions to the rule of exhaustion of domestic remedies provided in said provision are applicable or not to the case in question, must be made prior to and separately from the analysis of the merits of the matter, since it is dependent upon a standard of evaluation different from the one used to determine the violation of Articles 8 and 25 of the Convention.[FN28]. It must be clarified that the causes and effects that have prevented exhaustion of domestic remedies in this case shall be examined, to the extent it is relevant, in the

Report on the merits of the dispute adopted by the IACHR, in order to establish whether or not they constitute violations of the American Convention.[FN29]

[FN28] IACHR, Report N° 19/07, Petition 170-02, Admissibility, Ariomar Oliveira Rocha, Ademir Federicci & Natur de Assis Filho, Brazil, March 3, 2007, paragraph. 27; Report N° 23/07, Petition 435-2006, Admissibility, Eduardo José Landaeta Mejía & Otros, Venezuela, Mach 9, 2007, paragraph 47; Report N° 40/07, Petition 665-05, Admissibility, Alan Felipe da Silva, Leonardo Santos da Silva, Rodrigo da Guia Martins Figueiro Tavares et al, Brazil, July 23, 2007, paragraph 55.

[FN29] IACHR, Report N° 19/07, Petition 170-02, Admissibility, Ariomar Oliveira Rocha, Ademir Federicci & Natur de Assis Filho, Brazil, March 3, 2007, paragraph 27; Report N° 23/07, Petition 435-2006, Admissibility, Eduardo José Landaeta Mejía & et al, Venezuela, March 9, 2007, paragraph 47; Report N° 40/07, Petition 665-05, Admissibility, Alan Felipe da Silva, Leonardo Santos da Silva, Rodrigo da Guia Martins Figueiro Tavares et al, Brazil, July 23, 2007, paragraph 55.

2. Deadline for the Presentation of Petitions

78. In accordance with Article 46(1)(b) of the American Convention, for a petition to be admissible, one requirement is that it be lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment exhausting domestic remedies. Article 32 of the Rules of Procedure of the Commission, state that “in 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.”

79. In this case, because there is apparent ineffectiveness of existing remedies and possible undue delay in providing justice, the exceptions covered in Articles 46(2)(a) and (c) of the Convention and 37(2)(c) of the Rules of Procedure of the Commission are deemed applicable. In actuality, the first complaints of human rights violations at the provisional detention center were lodged more than eight years ago, with several other petitions being filed again subsequently, and therefore, since there is a high likelihood of further delays continuing in the courts, it is believed that the petition was filed within a reasonable period of time in accordance with Article 38(2) of the Rules of Procedure, and consequently the requirements set forth by the Convention to admit the petition to be processed have been met.

3. Duplication of Procedures and Res Judicata

80. With regard to the requirement that the petition is not pending in another international proceeding for settlement, as provided in Article 46(1)(c) of the Convention, the Commission has not received any information indicating the presence of this circumstance. Therefore, the Commission finds that it has been met. Furthermore, the Commission also found that the requirement established in 47(d) has also been met, inasmuch as this petition is not substantially

the same as any petition previously examined by the Commission or that has been decided by another international organization.

4. Statement of facts tending to establish a violation

81. The Commission must examine, in order to rule on admissibility of a petition, whether the alleged facts tend to establish a violation of the rights enshrined in the American Convention, as provided in Article 47(b) of said instrument, or whether the petition is “manifestly groundless” or is “obviously out of order”, pursuant to section (c) of the above-cited article. The standard for assessing those requirements is different from the one that is used to rule on the merits of a petition. Moreover, the Commission’s assessment is focused on determining, *prima facie*, whether the petition includes the basis for the possible or potential violation of a right guaranteed by the Convention, and not on establishing the actual existence of a rights violation. In other words, this determination constitutes a primary examination, that does not pre-judge or preclude a different finding on the merits of the matter.

82. Concerning the duties incumbent on the State with regard to persons who are in its custody, the Inter-American Court has found that:

As provided by Article 5(2) of the Convention, all persons deprived of their liberty shall be entitled to live in conditions of detention compatible with the inherent dignity of the human person and the State shall guarantee them [such persons] the right to life and personal integrity. Consequently, the State, as the entity responsible for establishments of detention, is the guarantor of these rights of detainees.[FN30]

[FN30] IA Court of H.R., Case of Neira Alegría, Judgment of January 19, 1995, Series C No. 20, paragraph 60.

83. Based on these considerations, the finding is made that, *prima facie*, the acts alleged by the petitioners may tend to establish a violation of Article 5 of the American Convention, in relation to the conditions of detention of the persons deprived of liberty at the Provisional Detention Center of Guarujá.

84. With regard to the children deprived of liberty, the IACHR believes that the alleged acts relating to the conditions of detention described above could tend to establish a breach of the State’s obligations in accordance with Articles 5 and 19 of the American Convention. In this regard, pursuant to the norms of interpretation set forth in the American Convention on Human Rights[FN31], as well as the criteria established by the Inter-American Court on Human Rights regarding the tendency to integrate the regional system and the universal system,[FN32] and taking into account the notion of *corpus juris* in the field of childhood[FN33], the Commission observes that it will interpret the scope and content of the rights allegedly violated to the detriment of the children declared alleged victims in this report in the light of the provisions set forth in the United Nations Convention on the Rights of the Child.[FN34].

[FN31] Article 29 Restrictions Regarding Interpretation; No provision of this Convention shall be interpreted as: (...) b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by another convention to which one of the said states is a party; (...)

[FN32] Inter-American Court of Human Rights Advisory Opinion OC 1/82 of September 24, 1982 regarding "Other treaties" subject to the consultative function of the Court (Article 62 of the American Convention on Human Rights) paragraph 41.

[FN33] Inter-American Court of Human Rights Case of Villagrán Morales et al vs. Guatemala, Merits, judgment of November 19, 1999, Series C N° 63, paragraph 194. Case of Instituto de Reeducación del Menor v Paraguay, Merits, judgment of September 2, 2004, paragraph 148. Case of the Gómez Paquiyauri Brothers v Perú, Merits, judgment of July 8, 2004, paragraph 166. Inter-American Court of Human Rights. Legal Status and Rights of the Child, Advisory Opinion (Condición Jurídica y Derechos del Niño), OC-17/02 August 28, 2002, Series A, number 17, paragraphs 24, 37, 53.

[FN34] This Convention was adopted on November 20, 1989 and took effect on September 2, 1990. Brazil ratified the Convention on the Rights of the Child on September 24, 1990.

85. Moreover, in applying the principle of *iura novit curia*, the Inter-American Commission shall examine the pleadings pertaining to Article 7 of the Convention of Belem do Para. Based on the pleadings submitted by the petitioners, it can be surmised that the girls might have been held at the Provisional Detention Center of Guarujá, in the context of the same structural conditions and insecurity as the other alleged victims. The Commission believes that the physical and psychological harm that the detention could cause these girls, who because of their age and gender are at particular risk of suffering acts of violence and assaults on their physical and psychological integrity, could constitute a violation of Article 7 of the Convention of Belem do Pará. The IACHR finds that these facts warrant a closer and more comprehensive examination during the merits stage.

86. In accordance with the alleged violations and the judicial remedies pursued in this context, and because of the undue delay in ruling on the aforementioned appeals, the Commission believes that these [appeals] could be a basis in fact for the alleged violation of the right to judicial protection set forth in Article 25 of the American Convention. Moreover, based on the principle of *iura novit curia*, the Commission believes that the facts of this case could involve a violation of Article 8(1) of the same Treaty. Additionally, the IACHR notes the allegation that in Brazil there is no effective recourse for ensuring that penitentiary system inmates are housed and treated decently, which could constitute noncompliance with the obligation set forth in Article 2 of the Convention. In short, in view of the facts reported and the judicial remedies attempted in that regard, the Commission finds that those facts could constitute violations of the rights enshrined in Articles 8.1 and 25 of the American Convention, together with the general obligations set forth in Articles 1.1 and 2 of that Convention.

87. Finally, in light of the lack of elements of proof and information regarding the circumstances in which 3 (three) of the detainees at the provisional detention center died in

November of 2007, the Commission finds that the petition is not admissible with regard to Article 4 of the American Convention.

V. CONCLUSION

88. The Commission concludes that it has jurisdiction to hear the petition and that it meets the requirements of admissibility, as set forth in Articles 46 and 47 of the American Convention

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

RESOLVES:

1. To declare, without prejudice to the merits of this complaint, that the petition is inadmissible with regard to Article 4 of the American Convention, and admissible with regard to the alleged violations of Articles 5, 19 and 25(1), in relation to the obligations emanating from Article 1(1), all of which are of American Convention.
2. By virtue of the principle of *iura novit curia* the IACHR declares this petition admissible with regard to the alleged violation of Articles 2 and 8(1) of the American Convention, as well as Article 7 of the Convention of Belem do Para.
3. To serve notice of this decision upon the State and the petitioners.
4. Continue with the examination of the merits of the case.
5. To make this report public, and include it in the Annual Report of the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 23rd day of the month of July, 2008.
(Signed): Paolo G. Carozza, Chairman; Luz Patricia Mejía Guerrero, First Vice-Chairwoman; Felipe González, Second Vice-Chairman; Sir Clare K. Roberts, and Víctor E. Abramovich, members of the Commission.