

Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 70/08; Petition 12.242
Session: Hundred Thirty-Third Regular Session (15 – 31 October 2008)
Title/Style of Cause: Pediatric Clinic of the Region of Los Lagos v. Brazil
Doc. Type: Decision
Decided by: Chairman: Paolo Carozza;
First Vice-Chairwoman: Luz Patricia Mejia Guerrero;
Second Vice-Chairman: Felipe Gonzalez;
Commissioners: Sir Clare K. Roberts, Florentin Melendez, Victor Abramovich.
The Commissioner Paulo Sergio Pinheiro, of Brazilian nationality, did not participate in the deliberations nor in the decision of the present case in accordance with article 17(2)(a) of the Rules of Procedure of the Commission.
Dated: 16 October 2008
Citation: Pediatric Clinic of the Region of Los Lagos v. Brazil, Petition 12.242, Inter-Am. C.H.R., Report No. 70/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 (2008)
Represented by: APPLICANTS: the Organizacao de Direitos Humanos- Projeto Legal, Associacao de Maes de Cabo Frio
Terms of Use: Your use of this document constitutes your consent to the Terms and Conditions found at www.worldcourts.com/index/eng/terms.htm

I. SUMMARY

1. On January 10, 2000, the Inter-American Commission of Human Rights (hereinafter, the “Inter-American Commission” or the “IACHR”) received a petition wherein the international responsibility of the Federal Republic of Brazil (“the State” or “Brazil”) was claimed for the deaths of ten newborn children, namely Nicolas Granzella Eboli, Alan de Souza Lima, Paloma Santos, Jennifer Ribeiro de Souza, Jessica Ribeiro de Souza, Hitalo Vieira Coimbra, Izabelle Alves dos Santos, Bruna Pacheco Martins, Luiz Guilherme de Abreu and Wliana Correia da Conceição, occurred in the year 1996 as a result of a presumed medical negligence of the personnel at the Clínica Pediátrica da Região dos Lagos (hereinafter “CLIPEL”)[FN2] in the city of Cabo Frio in the state of Rio de Janeiro; it is likewise alleged that the State is responsible for the suffering and violations of the judicial guarantees and judicial protection to the detriment of the fathers and mothers of said newborn children: Mrs. Marcela Beatriz Granzella, Marilucy Dias de Souza, Helena C. Gonçalves, Verônica Moreira Ribeiro, Rômulo Barcelos de Souza, Eliane da Conceição Vieira, Genilse Ferreira Pacheco Martins, Etelvina de Abreu, Vera Lúcia Alves dos Santos and Elianai Correia da Silva (“the presumed victims”). The petition was presented by the Organização de Direitos Humanos- Projeto Legal, later replaced by the Associação de Mães de Cabo Frio[FN3] (hereinafter “the petitioners”).

[FN2] The documentation provided shows that the Hospital Irmandade de Santa Isabel de Cabo Frio is a private institution that received funds from the State in the context of the public health system of Brazil called Sistema Unico de Salud better known as SUS. CLIPEL was physically located inside Hospital Irmandade Santa Isabel and provided neonatal services to said hospital.

[FN3] Non-profit association created by the mothers who lost their newborn children as a result of the alleged negligence of the physicians at CLIPEL.

2. The petitioners allege that, because this involves a private clinic, the State failed in its duty to inspect and evaluate CLIPEL in a timely manner, and in its duty to supervise the operation of the clinic. As a consequence, they sustain that the Brazilian State violated articles 4 (right of life), 8 (right to a fair trial), 19 (children's rights), and 25 (judicial protection) of the American Convention on Human Rights (hereinafter, "the Convention" or "the American Convention"), and it failed likewise in its general obligation enshrined in article 1.1 of the same instrument.

3. The State, in turn, timely raised the issue about the lack of exhaustion of domestic remedies, and in that regard, indicated that the criminal proceeding on the deaths has not been concluded yet because of its complexity. Brazil sustains that the petitioners had adequate and effective remedies to protect the rights that they claim have been violated. Furthermore, the State affirms that the deaths of the presumed victims were not consequences of the action of public agents, but of the healthcare personnel of a private clinic, and that that national authorities acted in an appropriate manner in the action brought forth by the petitioners.

4. Without prejudice to the merits of the case, and in accordance with what is stated in articles 46 and 47 of the American Convention, the Inter-American Commission decides to declare the petition admissible with regard to the presumed violation of articles 4.1, 8.1, 19 and 25 of the American Convention, all of them in relation to the general obligation to respect and ensure the rights previously mentioned in the first article 1.1 of said international instrument. Additionally, in accordance with the *iura novit curia* principle, the IACHR declares the petition about the presumed violation of article 5.1 of the American Convention admissible. Also, the Commission chooses to publish this report and to include it in its Annual Report before the General Assembly of the Organization of American States (OEA).

II. PROCEEDING BEFORE THE COMMISSION

5. The report was received on January 10, 2000. The IACHR transmitted the pertinent parts of the petition to the State on January 13, 2000 and established a period of ninety days for it to present its observations. On March 21, 2000, the State presented its response.

6. Likewise, the IACHR received additional information from the petitioners on the following dates, May 25, 2000, November 21, 2000, February 21, 2000, June 5, 2001, January 24, 2002, June 19, 2002, November 27, 2002, June 2, 2003, June 4, 2007, November 14, 2007, February 13, 2008, February 19, 2008, April 8, 2008, and June 13, 2008. Said communications were duly forwarded to the State.

7. On the other side, the IACHR received observations from the State on the following dates: November 6, 2001, January 23, 2008, March 3, 2008, April 24, 2008, May 5, 2008 and May 28, 2008. Said communications were duly forwarded to the petitioners.

III. POSITIONS OF THE PARTIES

A. The petitioners

In regard to the general context of health services for infants

8. The petitioners contend that during the time the incidents occurred, it was common in Brazil for the media to report on the deaths of children resulting from infections that were contracted in health centers, and that at the time, it was constant practice that such cases remained in total impunity. In that regard, the petitioners exemplified the former, making reference to cases that occurred in Rio de Janeiro, Roraima and Ceará. Likewise, they mention that between June 1996 until March 1997, 82 babies had died in CLIPEL.

In regards to health services in the ICU neonatal section of the CLIPEL

9. According to the petitioners, among the 82 dead children, they found ten presumed victims in this petition[FN4], supposedly the result of acts practiced by doctors in the neonatal intensive care unit (hereinafter "ICU") of CLIPEL. The petitioners argue that the children died because of an infection in the hospital that was a result of medical negligence.

[FN4] Nicolas Granzella Eboli, son of Marcella Beatriz Granzella, was born on September 11, 1996 and died September 16, 1996. Alan de Souza Lima, son of Marilucy Dias de Souza, was born on July 25, 1996 and died August 21, 1996. Paloma Santos de Souza, daughter of Helena Gonçalves dos Santos, was born on December 1, 1996 and died December 10, 1996. Jennifer Ribeiro de Souza and Jessica Ribeiro de Souza, daughters of Veronica Moreira Ribeiro and Romulo Barcelos de Souza, was born on December 22, 1996 and died December 28, 1996. Hitalo Viera Coimbra, son of Eliane Conseicao Vieira, was born on June 23, 1996 and died August 4, 1996. Izabella Alves dos Santos, daughter of Vera Lucia Alves dos Santos, was born on June 22, 1996 and died June 26, 1996. Bruna Pacheco Martins, daughter of Genilse Ferreira Pacheco Martins, was born on August 25, 1996 and died August 29, 1996. Luiz Guilherme de Abreu, son of Etelvina de Abreu, was born on September 6, 1996 and died September 10, 1996. Wliana Correia da Conceição, daughter of Elianai Correia da Silva, was born on October 25, 1996 and died November 18, 1996.

10. The petitioners sustain that CLIPEL represented itself as a private clinic, physically situated in the Irmandade de Santa Isabel Hospital in the Municipality of Cabo Frio - Rio de Janeiro where they provided ICU neonatal services to the State. Said hospital received funds from the State under the name of public system of health of Brazil called Sistema Unico de Salud[FN5] (hereinafter "SUS") for the operation of the neonatal ICU. Additionally, the

petitioners stress that the majority of the children born in CLIPEL were of families with reduced economic resources since their medical services were financed by the SUS.

[FN5] It should be mentioned that Sistema Unico de Salud (SUS) was created by the Federal Constitution of 1996 and ruled by laws No. 8.080/90 (Organic Law of Health) and No. 8.142/90, establishing obligatory public healthcare for every citizen. This system is composed of health centers, hospitals, laboratories and blood-sample centers, in addition to the foundations and institutes of investigation. Through the SUS, all citizens have a right to medical attention in the healthcare units of it combined in the public spheres of municipal, state and federal. The private sector participates in the SUS in order to compliment the services of the State through contracts in case of public healthcare units are not sufficient to guarantee care to the entire population of a given region.

11. They also argue that the doctors and nurses of the hospital did not follow basic guidelines of healthcare like wearing gloves, washing hands after touching the children, changing coats or disinfecting them before examining babies, and that they did not discard the aprons worn by visitors and nurses. The petitioners indicate that since 1993 the Regional Counsel of Nursing in Rio de Janeiro (Conselho Regional de Enfermagem do Rio de Janeiro) made various attempts to prosecute CLIPEL and investigate the healthcare conditions. Nevertheless, its representatives were prevented from entering the hospital center.

12. The petitioners sustain that the illicit conduct of the doctors of CLIPEL is illustrated in the documentation of the case of the child Nicolas Granzella Eboli who was admitted in good health to the neonatal ICU of CLIPEL in order to receive oxygen for some hours, and it was there that he acquired an infection classified as mild by the doctors. On the sixth day of his stay at the neonatal ICU, the child died as a result of an infection from the bacteria *Kelbsiella Pulmonae*. According to the petitioners, the doctors explained to the parents that the infection that caused the death of the child was acquired in utero. However, the statement of the obstetrician, Dr. José Luís Borges, who delivered the baby, established that his death was the result of an infection he contracted at CLIPEL.[FN6]

[FN6] In that regard, the petitioners cite the statement of Dr. José Luis Borges, provided in his Medical Report of Gynecology and Obstetrics. The document that verifies this is in the file.

13. Likewise, the petitioners described what happened in the case of the child Alan de Souza Lima who was born at the Hospital Sao José Operário de Cabo Frío and was transferred to the ICU at CLIPEL because of problems with diabetes from the mother. They mention that according to the blood tests performed before he was transferred to CLIPEL, the child did not have any type of bacteria in his body. However, later after being transferred to CLIPEL, *KLEBSIELLA* bacteria was detected in his blood.

14. The allegations about the deaths of the other children who are presumed victims are based also in a presumed failure of basic guidelines of medical attention and alleged negligence of the personnel at CLIPEL. The mothers and fathers that appear as petitioners initiated an investigation of the facts at the Cartório do Registro Civil de Cabo Frio and in the Osmane Sobral Rezende Laboratory where they obtained proofs of the existence of various infectious outbreaks at CLIPEL. In spite of the alleged complaints, the petitioners affirm that CLIPEL continued admitting children to the neonatal ICU without any taking any sort of measure to eradicate the reported unhygienic conditions.

Regarding the administrative and civil actions by the petitioners

15. The petitioners affirm that the contamination of the neonatal ICU was reported to the Secretaries of State and Municipal Health and to the Ministry of Health. However, the petitioners state that after various inspections were performed at CLIPEL[FN7] and in spite of having the reports and documents presented by the family and specialists under their consideration, said institution had produced a document which concluded that it was not possible to verify infractions that could explain the deaths that occurred in the ICU. Also, the petitioners indicate that they submitted reports to the Department of Human Rights of the Ministry of Justice and to the Secretary of Justice and Human Rights of Rio de Janeiro.

[FN7] In that regard, the petitioners argue that in 1998, the Ministry of Health designated a Disciplinary Commission of Investigation who acted in the city of Cabo Frio for a three-month period. Nevertheless, none of the mothers who submitted the complaint was ever informed nor summoned by said commission.

16. Additionally, the petitioners sustain that some of the family members of the presumed victims filed civil actions individually to claim indemnity for the damages caused by the deaths of the presumed victims. Nevertheless, they indicate that said actions were characterized by irregularities like the adulteration of medical records. They sustain that due to a lack of economic resources, they did not consult with attorneys and for the most part, they did not have access to civil files as the First Civil Court of Cabo Frio, since it only permits attorneys to review these documents.

17. Additionally, the petitioners indicate they submitted petitions to the Public Ministry for that office to conduct a civil investigation to determine the responsibility associated with the deaths of the presumed victims. In that regard, the petitioners informed that the civil investigation that was initiated was concluded with the judgment from the Public Ministry rendered on May 9, 2006. The petitioners mention that they filed a motion for reconsideration against the judgment of record in which they reiterated the supposed procedural irregularities to the Public Ministry. Nevertheless, this motion for reconsideration was rejected by the judgment that was rendered by the Public Ministry on October 24, 2006. The petitioners indicate that when the Public Ministry made its judgment, it had taken into account the conditions of the new sanitary conditions at CLIPEL, which did not correspond to the place where the incidents of this case occurred.

In regard to the criminal process of culpable homicide

18. The petitioners indicate that on April 7, 1997, the fathers and mothers of the presumed victims of this case presented a criminal complaint to the Public Ministry to investigate the deaths of their children which occurred at CLIPEL. On April 8, 1997, the Public Ministry petitioned the Chief of the Fourth Regional Division of Civil Police to initiate a criminal investigation about the reported incidents whereas a copy of the file was remitted to the Attorneys of Child Protection and Justice for the jurisdiction of Cabo Frio.

19. The petitioners add that on September 4, 1997, the criminal investigation was concluded and the technical director of CLIPEL was indicated as presumably responsible for the crime of homicide, typified in article 121 of the Penal Code of Brazil. In accordance with the final report of the police investigation the defendant allegedly acted with “negligent intention,” that is to say, he had knowledge of the possibility or probability of an injury, but he assumed the risk of this result. According to the petitioners, only on September 21, 1999, did the Public Ministry present its indictment before the Judge of Criminal Law in the Court of Cabo Frio.

20. The petitioners allege that during the investigation and judicial evidentiary stage, various violations of judicial guarantees occurred. Likewise, they mention the unjustified delay in the investigations, the lack of inclusion in the file of the blood tests which were not required of the Osmane Sobral Rezende Laboratory by the judge, in spite of having been provided by the petitioners including fifty (50) blood samples of children who were diagnosed with the infection which were, in their opinion, fundamental toward determining the cause of the deaths and the responsibility of those presumed responsible; the arbitrary behavior of the Public Ministry to impede their participation in the accusation and the lack of response from the office after receiving the reports that were presented in connection to the irregularities in the procedure, such as the adulteration of tests. They also mention the Criminal Court’s rejection of the petitioners’ application for forensic exams, the validity of the test that was not based on the inspection of the technical evidence such as the blood samples and the medical histories of the children[FN8], the loss of testimony and of some of the defendants in the investigation; difficulty in obtaining copies of the investigation reports. Likewise, they emphasize that in spite of applying for it, they did not consult with legal assistance during the majority of the process which clearly placed them at a disadvantage toward the defense of their rights.

[FN8] Likewise the petitioners, in the communication of November 27, 2000, indicate that in the evidence that was accepted by the judge in order to determine the defendants’ culpability or not, the sentence corresponding to the indemnity action filed by Ms. Marilucy Dias de Souza had been included. They said that the referenced action was flawed by violations of due process such as the adulteration of the laboratory tests performed to determine the presence of bacteria, namely *KLEBSIELLA PNEUMONIAE*, in the body of her child, Alan de Souza Lima. Also, they argue that after having complained about these incidents to the Public Ministry, their petitions were ignored by said authority.

21. Pursuant to the petitioners, in the context of such irregularities, on February 24, 2003, the judge issued a sentence and absolved the defendants in accordance with article 386 paragraph II of the Procedural Penal Code of Brazil which establishes that the judge should absolve the defendants when there is no proof of the existence of the alleged facts.

22. According to the petitioners' information, the Public Ministry presented an Appeal against said decision on February 26, 2003. On March 15, 2005, the Fourth Criminal Circuit of the Tribunal of Justice partially changed the first sentence to confirm the absolution of the defendants, only by modifying the reasoning, and indicating that the case corresponded to clause VI of article 386 of the Procedural Penal Code. That is to say, no sufficient proof existed in order to determine the responsibility of the defendants for the culpable homicide. Against said judgment, on April 20, 2005, the defendants brought forth a remedy of "Embargos infringentes e de nulidade" before the Tribunal of Justice, alleging a supposed ambiguity in the text thereof. On October 11, 2007, the Tribunal resolved to provide the referenced remedy by the decision that was published on January 29, 2008.

23. Finally, in a first stage of the proceeding before the IACHR, the petitioners sustained that in conformity with what was previously mentioned in article 46 of the American Convention, an unjustified delay in the action of domestic remedies had been registered which established the exception of the exhaustion of domestic remedies. However, after the presumed conclusion of the criminal procedure in the domestic jurisdiction, without any effective remedy for the protection of the rights they allege have been violated, the petitioners sustain that the domestic remedies had been exhausted and as such, they ask that their petition be declared admissible.

B. The State

24. In response to the complaint, the State counterclaimed on the allegations of the petitioners and indicated that the domestic remedies had not been exhausted. The State alleges that it has always facilitated effective judicial remedies for the victims and that the national authorities had acted appropriately pursuant to the aforementioned in Brazilian law.

25. The State affirms likewise that its responsibility for the deaths of the children at CLIPEL is not demonstrated given that: the presumed violations to human rights were not committed by agents of the State; the Public Ministry, the Police and the Judicial branch have offered the necessary conditions to secure access to the family members of the victims to impartial and effective investigations toward identifying and sanctioning those responsible of the alleged crimes; and they had not exhausted the remedies of the domestic jurisdiction.

26. The State sustains that the presumed irregularities that were found at CLIPEL were brought to the attention of the Public Ministry on April 7, 1997, which required immediate police investigation by the Fourth Regional Division of Civil Police. The report of the investigation indicated the technical director of CLIPEL as the party responsible for the occurrences in said healthcare unit. After receiving the report from the chief of police, the Public Ministry considered it necessary to investigate the situation further and the files were returned to the 126th District of Police of Cabo Frio in order to carry out further investigations. One of those was to take statements from the nurses and the doctors of CLIPEL with regards to obtaining the

laboratory tests. A number of reports from medical experts were made from the Medical Legal Institute of the Institute Fernandez Figueira and the State Secretary of Health which confirmed irregularities in the operations at CLIPEL.

27. Brazil informed that on December 21, 1999, the Public Ministry indicted eight physicians from CLIPEL for culpable homicide[FN9] aggravated by inobservance of technical rules of their profession. In its complaint the Public Ministry considered that between May of 1996 and April 1997, 52 (fifty-two) newborn patients admitted to the neonatal ICU at CLIPEL died because of contamination of bacteria and germs at that hospital center. According to the State, the report was received by the Judge of Criminal Law of the Jurisdiction of Cabo Frio on January 24, 2000.

[FN9] The State informed that the following people had been indicted for culpable homicide: Mr. Luis Cavalcante Lopes, technical director of CLIPEL, Geraldo Francisco de Carvalho, Fernando Wmellinger, Maria Lourdes Guerson, Katia Maria Almeida Enrique, Denise Garcia de Freitas Machado e Silva Filho, Carlindo Machado e Silva Filho and Luis Antonio do Nascimento. It added that the penalty established for this type of crime was one year and four months to four years in prison.

28. With regard to the contamination at ICU, the State affirms that it occurred as a result of its having overcrowded its capacity to admit patients and the irregularities that were confirmed by the Department of Sanitation of the State of Rio de Janeiro.

29. Likewise, it states that in the procedural criminal system, the satisfaction of the damage for a crime is not an integral part of the sentence for which reason a criminal sentence is not a condition for the injured party to file a claim in a civil court. Furthermore, it added that in case the petitioners needed free legal assistance, this could be provided by the Public Defender. Likewise, the State sustains that for the Commission to declare the petition admissible, it would have to act as a fourth instance.

30. In the communication received at the IACHR on April 24, 2008, the State indicates that the criminal procedures of the domestic jurisdiction had been carried out in accordance with the rules and domestic jurisprudence; therefore, they had not incurred in omission of its obligation to investigate the facts about presumed violations of human rights. The State alleges that the decisions rendered by the domestic courts cannot be revised by the Commission and that such decisions rendered regarding those presumed responsible were adopted by virtue of the principle in dubio pro reo. Likewise, the State has argued that the petitioners have not exhausted their adequate domestic remedies in order to determine criminal and civil responsibility. In case that they were not in agreement with the decision that was rendered at the instance, they have the right to bring forth a Special Appeal or an Extraordinary Appeal in accordance with the Constitution of the Federal Republic of Brazil. And as for the foundation of its allegations, the State sustains that the allegations of the petitioners are not admissible in regards to the domestic remedies or in regard to the unjustified delay.

IV. ANALYSIS OF ADMISIBILITY

A. Jurisdiction of the Commission *rationae personae*, *rationae materiae*, *ratione temporis* and *rationae loci*

31. The petitioners possess *locus standi* to present complaints before the Commission pursuant to article 44 of the American Convention on Human Rights. The petition establishes the children: Nicolas Granzella Eboli, Alan de Souza Lima, Paloma Santos, Jennifer Ribeiro de Souza, Jessica Ribeiro de Souza, Hitalo Vieira Coimbra, Izabelle Alves dos Santos, Bruna Pacheco Martins, Luiz Guilherme de Abreu and Wliana Correia da Conceição[FN10], and their fathers and mothers, Mrs. Marcela Beatriz Granzella, Marilucy Dias de Souza, Helena C. Gonçalves, Verônica Moreira Ribeiro, Rômulo Barcelos de Souza, Eliane da Coneição Vieira, Genilse Ferreira Pacheco Martins, Etelvina de Abreu, Vera Lúcia Alves dos Santos and Elianai Correia da Silva, as victims. They are individuals regarding to whom Brazil has promised to respect and secure rights in the American Convention. With regard to the State, the Federal Republic of Brazil ratified the American Convention on Human Rights on September 25, 1992. Therefore, the Commission has jurisdiction of *rationae personae* to examine the petition.

[FN10] The American Convention does not define who are children. As such, according to the terms of article 31 of the Vienna Convention on the Law of Treaties, the Inter-American Commission on Human Rights applies the concept established in International Law in the United Nations Convention on the Rights of the Child, which defines children as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

32. The list of alleged victims in the previous paragraph is established for purposes of the admissibility of the petition, and if pertinent and consistent with the requisites, it could be lengthened to include other persons in the same situation described in this petition.[FN11]

[FN11] See *mutatis mutandi*, IACHR, Admissibility Report No. 36/07, Petition 1.113-06. Persons Deprived of Liberty in the cells at the 76th Police Precinct (76th PD) of Niterói, Rio Janeiro (Brazil) of July 17, 2007.

33. The IACHR has jurisdiction *rationae loci* to hear the petition because it makes allegations of violations of human rights protected by the American Convention that supposedly took place within the jurisdiction of the State of Brazil, a party in said treaty.

34. Likewise, the Inter-American Commission has jurisdiction *rationae temporis* since the alleged violation of rights that are protected by the American Convention took place after the date on which the Convention was already in force for Brazil. In the same regard, the Commission also has jurisdiction *rationae materiae* as the petitioners report presumed violations of rights protected by the American Convention.

B. Other requirements for admissibility of the petition

1. Exhaustion of domestic remedies

35. Pursuant to article 46(1) of the American Convention, for the purposes of admissibility of a petition, it is necessary that the remedies of the domestic jurisdiction have been exhausted, in accordance with the generally recognized principles of international law. In paragraph 2 of the aforementioned rule it is established that those dispositions should not be applied when there is no due legal process toward the protection of the right in question in domestic legislation, or if the supposed victim did not have access to the remedies of domestic jurisdiction, or if there was an unjustified delay in judgment about said remedies.

36. In their first communications, the petitioners allege that there was an unjustified delay in the proceedings in the domestic jurisdiction because when the petition was received by the IACHR on January 10, 2000, almost two and a half years later, after the incidents occurred, the Public Ministry had not submitted the complaint toward the establishment of any penalty. Additionally, the petitioners emphasize that during the criminal process of homicide, judicial rights were supposedly not respected which had an impact on the effectiveness of the remedy. The petitioners complained to the Public Ministry[FN12], about the adulteration of the proof, ideological falsehood and omission in the criminal proceeding in regard to the 82 babies who died at CLIPEL[FN13]. Likewise, the petitioners complain about the negligence of the Public Ministry on the conduct of the criminal investigation. They report that in the judgment rendered by the first instance judge, he observed the ineptitude with which the Public Ministry had acted upon trying to protect the interests of the presumed victims, stressing that the text of the indictment submitted by that office did not properly individualize the conduct of each of the defendants, but rather attributed the same conduct to all of them.[FN14] Nevertheless, the petitioners argue that the judge acted partially and concluded by absolving the defendants. As for the civil investigation, the petitioners impart that the majority of the processes initiated did not move forward due to violations of due process and without their having consulted an attorney. Also, the State had arbitrarily limited their right of defense in particular by not allowing them to participate in the process; they did not even have access to the file[FN15]. Likewise, in regard to the civil investigation, they state that after the proceeding, the case remained paralyzed for the previously indicated reasons, and then it was arbitrarily archived by the Public Ministry on May 9, 2006.

[FN12] Complaint submitted to the Public Ministry on April 18, 2006.

[FN13] Report of the attorney of the Public Ministry of the State of Rio de Janeiro issued under administrative procedure No. 006/2003 on October 11, 2005. Written and submitted to the Department of Juvenile Justice of Cabo Frio, it details the irregularities that were confirmed in the existing evidence in the criminal proceeding.

[FN14] Sentence of the Judge of February 2003.

[FN15] Communications of the petitioners of November 27, 2000, June 5, 2001 and February 19, 2008.

37. To summarize the State's position, it has already been noted that it opportunely presented the defense of lack of exhaustion of domestic remedies and stated that although the authorities had provided all of the effective and adequate remedies to the petitioners, the criminal process had been prolonged for a number of years as a result of its complexity. The State has repeatedly argued that the petitioners could bring forth other domestic remedies in the context of the aforementioned criminal process. For example, the State indicates that after the Tribunal of Justice issued the sentence on October 11, 2007, the petitioners could have presented an extraordinary appeal or a special appeal[FN16]. Likewise, the State remarks that the presumed victims could have claimed indemnity for damages and suffering in a civil court provided that the civil action was independent from the criminal case.

[FN16] Communication of the State of January 23, 2008.

38. The IACHR notes that in cases wherein crimes of public action are identified, such as homicide, criminal investigation and proceeding is the adequate remedy. As such, the IACHR observes that the criminal investigation performed by the Civil Police was initiated by the petitioners' complaint of April 7, 1997, and the subsequent criminal proceedings before the national tribunals were initiated in December of 1999. It is further verified that the acquittal sentence of first instance in the criminal proceeding for culpable homicide was issued on February 24, 2003. The judgment was appealed and the Tribunal of Justice maintained the absolution of the defendants by the sentence rendered on March 15, 2005.

39. The Inter-American Commission highlights that, according to Brazilian legislation, the special appeal[FN17] and the extraordinary appeal[FN18], can be utilized only in situations wherein ordinary remedies are not possible. This is to say, they are extraordinary in nature. Furthermore, Brazilian legislation requires the existence of a definitive judicial decision ("in a single or ultimate instance") as a sine qua non requisite for the filings of said appeals[FN19]. Additionally, the IACHR observes that said appeals are intended strictly for discussion of questions of law without possibility of reevaluation of the facts of the decision under appeal. In the case of the extraordinary appeal, said discussion should be based in a constitutional controversy, while in the case of the special appeal it should be based in a jurisprudential divergence or a violation of federal law.

[FN17] Constitution of the Federal Republic of Brazil of 1988. Article 105. The Supreme Court of Justice is competent: (...) III—to examine special appeals, in a unique or ultimate instance, from decisions issued by the Federal Regional Tribunals or by the Tribunals of the states, the federal district and territories, when the appealed decision: a) is contrary to a treaty or federal law, or negates its validity; (...) c) gives a divergent interpretation to the federal law in respect with the one established by another court. (translation not official).

[FN18] Constitution of the Federal Republic of Brazil of 1998. Article 102. The Federal Supreme Court is competent: (...) III—to try the rendered judgments, by means of extraordinary appeal, in a unique or ultimate instance when a decision under appeal: a) is contrary to a provision of this Constitution; (...) (translation not official)

[FN19] Articles 105 III, and 102, III, of the Federal Constitution, respectively.

40. In this regard, the IACHR notes that in general it is not necessary to bring forth extraordinary appeals, especially when they have limited reach and when one of the principle allegations of the petitioners is based in the presumed deficiencies of the investigation of the facts (supra par. 20)— which, in the present case, could not be resolved by the special and extraordinary appeals mentioned by the State — so the exhaustion of said appeals of extraordinary nature is not necessary. Indeed, the Commission notes that the special and extraordinary appeals indicated supra (par. 39), are not intended to remedy the supposed deficiencies during the investigations stage of criminal procedure.

41. In that same regard, the IACHR has previously established that:

While in some cases these extraordinary remedies may be suitable for addressing human rights violations, as a general rule the only remedies that need be exhausted are those whose function within the domestic legal system is appropriate for providing protection to remedy an infringement of a given legal right. All domestic systems have multiple remedies, but not all are applicable in all circumstances. If, in a specific case, the remedy is not appropriate, then obviously it need not be exhausted.[FN20]

[FN20] IACHR, Report No 5/02, Petition 12.080. Admissibility, Sergio Schiavini and Maria Teresa Schnack de Schiavini, Argentina, February 27, 2002, par. 53. See, in the same sense, IACHR, Report No. 68/01, Case 12.117, Admissibility, Santos Soto Ramírez and others, Mexico, June 14, 2001, par. 14; and Report No. 83/01, Case 11.581, Admissibility, Zulema Tarazona Arriate and others, Peru, October 10, 2001, par. 24.

42. Inasmuch, the Commission considers that criminal procedure with regard to the facts in the present case is found to be exhausted in terms of ordinary remedies, and as such, the previous exhaustion requirement is found to be complied with by virtue of the fact that a definitive judicial decision had been dictated in the aforementioned criminal proceeding regarding the deaths of the presumed victims.

43. Based on the previous considerations, the Commission declares that the petition complies with the requisite of article 46.1.a. of the Convention.

2. Deadline for lodging a petition

44. Article 46.1.b. of the American Convention mandates that the petition 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.” In the present case, the Inter-American Commission ruled itself supra over the exhaustion of domestic remedies. The petition was submitted on January 10, 2000, before the exhaustion in question. This organ understands that the approval time of the report of admissibility is when the analysis of the requisites of admissibility must be performed.

In that regard, the Commission concludes that the requisites of article 46.1.b of the American Convention in connection to the case sub examine has been met.

3. Duplication of procedure and res judicata

45. The file does not show that the material of the petition is pending in any other international settlement proceeding, or that the petition has been reviewed by this or another international body. As such, the requisites established in articles 46.1.c and 47.d of the Convention have been met.

4. Characterization of the alleged facts

46. It is the duty of the Inter-American Commission to determine that the facts described in the petition tend to characterize violations of rights of the American Convention according to the requirements set forth in article 47.b, or if the petition, pursuant to article 47.c is to be rejected for being “manifestly groundless” or if it is “obviously out of order.” In this procedural stage, the IACHR is to perform a prima facie evaluation, not with the objective of establishing presumed violations to the American Convention, but to examine if the petition denounces facts that potentially tend to establish violations of rights guaranteed in the American Convention. This decision does not imply prejudice nor anticipation of the merits of the issue[FN21].

[FN21] IACHR, Report No. 21/04. Petition 12.190, Admissibility, Jose Luis Tapia González and others, Chile, February 24, 2004.

47. The State alleges that the judicial decisions rendered in the criminal proceeding are legitimate because they have been rendered in accordance to the judicial rights and inasmuch, the review of the case by the Commission would characterize the fourth instance formula[FN22]. In that regard, the Commission considers it pertinent to point out that such rule does not permit the review of sentences rendered by national tribunals that may be within the realm of its competence and applying the due judicial safeguards, unless it considers the possibility that there may be a violation of the Convention. The Commission is competent to declare the petition admissible and adjudicate on the merits when this refers to the principles of due process. In that respect, the function of the Commission consists of ensuring the observance of obligations assumed by the States that are parties to the American Convention, but it cannot replace a higher court to review supposed errors of law or of facts that might have been committed by national courts that were acting within the boundaries of their competence. A review of such nature would only correspond inasmuch that the errors resulted in a possible violation of any of the rights enshrined in the American Convention.

[FN22] Communication from the State received January 23, 2008 and communication of April 24, 2008.

48. The Inter-American Commission considers that, in this stage of the proceeding, it is not supposed to determine if the alleged violations were enacted or not. However, the Commission notes that, in case the alleged deficiencies are proven by the petitioners, with relation to judicial guarantees and protection, in particular those relating to: the right to a hearing with due guarantees and within a reasonable time by the competent authorities and with due judicial protection, could characterize violations of the right to judicial guarantees enshrined in Articles 8.1 and 25 of the American Convention.

49. Likewise, the IACHR notes that the presumed victims are newborn infants[FN23] to whom the State has special obligations that should be held in consideration of the special characteristics of first infancy, as this is an essential time for securing the rights of children in accordance with article 19 of the American Convention. One of the special obligations of fundamental importance in these cases is to act in a diligent and immediate manner to assure the full scope of human rights. In that sense, the Commission considers that the incidents mentioned in the present case could characterize a violation of children's rights as established in article 19 of the American Convention.

[FN23] The Committee on Children's Rights defines infants as persons who are "in the stage of life up until the age of eight" (See General Observation 7 (2005). Effectuation of Children's Rights of Early Childhood, CRC/C/GC/7 Rev. 1, September , paragraph 4).

50. Furthermore, the Inter-American Commission believes it pertinent to take into consideration that the deaths of the presumed victims by virtue of the presumed omission of the State in compliance with the duty to supervise the services on the part of CLIPEL could characterize a violation of the right to life mentioned in article 4.1 of the Convention associated with the compliance of the State's with its obligation enshrined in article 1.1 of the same instrument. In that sense, in the appropriate stage, the IACHR will analyze the duty of the State to prevent violations of right to life over a due supervision of the operations of CLIPEL and to respond to said deaths through a diligent investigation pursuant to due process.

51. Likewise, in application of the principle *iura novit curia*, the IACHR believes that the incidents alleged by the petitioners could characterize violations to article 5.1 of the American Convention to the detriment of the family members of the presumed victims because of the possible suffering caused by the circumstances of the deaths of the ten children and the impunity thereof.

52. Finally, the Commission highlights the fact that, pursuant to the regulations of interpretation established by the American Convention[FN24], such as the criteria established by the Inter-American Court of Human Rights with regard to the tendency to integrate the regional and universal systems[FN25], and with regard to the notion of *corpus juris* in matters of children[FN26], the Commission will interpret the limit and the content of the rights that are alleged to have been violated to the detriment of the children named as presumed victims in this report in light of the provisions of the United Nations Convention on the Rights of the Child[FN27].

[FN24] American Convention on Human Rights Article 29 Rules of 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 virtue of another convention to which one of the said states is a party (...).

[FN25] I/A Court H.R., "Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1. Paragraph 41.

[FN26] I/A Court H.R., The "Street Children" Case (Villagrán Morales et al.). Judgment of November 19, 1999. Series C No. 63, paragraph 194. I/A Court H.R., Case of the "Juvenile Reeducation Institute". Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, paragraph 148, I/A Court H.R., Case of the Gómez-Paquiyaui Brothers. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, paragraph 166. I/A Court H.R., Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paragraphs 24, 37, 53.0.

[FN27] This Convention was adopted on November 20, 1989 and entered into force on September 2, 1990. Brazil ratified the Convention on Children's Rights on September 24, 1990.

53. In consideration of the aforementioned, the IACHR concludes that the petitioners have prima facie complied with the requisite in article 47.b of the American Convention.

V. CONCLUSIONS

54. The Inter-American Commission concludes that it has jurisdiction to hear the subject of this case and that petition is admissible pursuant to articles 46 and 47 of the American Convention based on the arguments of fact and law previously explained, and without prejudice to the analysis of the merits of the matter.

THE INTER-AMERICAN COMMISSION FOR HUMAN RIGHTS,

DECIDES:

1. To declare the present petition admissible in regard to the presumed violations of rights protected in articles 4, 8.1, 19 and 25 of the American Convention in connection to the general obligation enshrined in article 1.1 of said treaty;
2. To declare the petition admissible by virtue of the principle *iura novit curia* in regard to article 5.1 of the American Convention in connection with article 1.1 of said international instrument;
3. To notify the parties of this decision;
4. To continue with the analysis of the matter in question, and
5. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 16th day of the month of October, 2008.
(Signed): Paolo G. Carozza, Chairman; Luz Patricia Mejía Guerrero, First Vice Chairwoman,
Felipe González, Second Vice Chairman; Sir Clare K. Roberts, Florentín Meléndez, and Víctor
Abramovich, members of the Commission.