

Inter-American Court of Human Rights

Case of Ximenes-Lopes v. Brazil

**Judgment of July 4, 2006
(Merits, Reparations and Costs)**

In the case of *Ximenes-Lopes*,

The Inter-American Court of Human Rights (hereinafter "the Inter-American Court," "the Court" or "the Tribunal"), composed of the following judges**:

Sergio García-Ramírez, President;
Alirio Abreu-Burelli, Vice-President;
Antônio A. Cançado Trindade, Judge;
Cecilia Medina-Quiroga, Judge;
Manuel E. Ventura-Robles, Judge, and
Diego García-Sayán, Judge,

also present,

Pablo Saavedra-Alessandri, Secretary, and
Emilia Segares-Rodríguez, Deputy Secretary;

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 29, 31, 53(2), 56 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers the following Judgment.

I

Introduction of the Case

1. On October 1, 2004, pursuant to the provisions of Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed before the Court an application against the Federal Republic of Brazil (hereinafter "the State" or "Brazil") originated in Petition No. 12,237, filed before the Secretariat of the Commission on November 22, 1999.

2. The Commission filed the application for the Court to determine whether the State had violated the rights embodied in Articles 4 (Right to Life), 5 (Right to Humane Treatment), 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of

** Judge Oliver Jackman informed the Court that, for reasons beyond his control, he would be unable to attend the deliberations and sign the instant judgment.

the American Convention in relation to the obligation set forth in Article 1(1) (Obligation to Respect Rights) of said treaty, to the detriment of Damião Ximenes-Lopes (hereinafter “Damião Ximenes-Lopes”, “Ximenes-Lopes” or “the alleged victim”), for the alleged inhuman and degrading hospitalization conditions of Damião Ximenes-Lopes, a person with mental illness; the alleged beating and attack against the personal integrity of the alleged victim as a result of the action of the Officers of *Casa de Reposo Guararapes* (Guararapes Rest Home) (hereinafter “Casa de Reposo Guararapes” or “the hospital”); his death while held under psychiatric treatment; and the alleged lack of investigation and respect for the right to a fair trial that derived in the impunity surrounding such case. The alleged victim was hospitalized on October 1, 1999 as part of a psychiatric treatment in Casa de Reposo Guararapes, which is a private psychiatric clinic that operated in the public health system of Brazil, called the Uniform Health System (hereinafter “the Uniform Health System” or “the SUS”), in the Municipality of Sobral, state of Ceará. Ximenes-Lopes died on October 4, 1999 in Casa de Reposo Guararapes after three days of hospitalization.

3. The Commission further stated that the events in the instant case are particularly relevant given the situation of vulnerability of persons with mental illness, and the special obligation of the State to provide protection to individuals held in health centers operating within the State Uniform Health System. Consequently, the Commission requested the Court to order the State to adopt the measures of reparations outlined in the application and to reimburse any legal costs and expenses.

II Competence

4. The Court has jurisdiction to hear the instant case pursuant to Article 62(3) of the Convention as Brazil has been a State Party to the American Convention since September 25, 1992 and accepted the contentious jurisdiction of the Court on December 10, 1998.

III Proceeding before the Commission

5. On November 22, 1999, Irene Ximenes-Lopes-Miranda (hereinafter “the applicant”) filed an application before the Inter-American Commission against Brazil, in which she explained the events that had befallen her brother Damião Ximenes-Lopes.

6. On December 14, 1999, the Commission processed the application under No. 12,237 and requested the State to report, within the subsequent 90 days, “any element that may allow the Commission to verify whether, in the case of [...], all domestic remedies have been exhausted.”

7. On October 9, 2002, during its 116th Regular Session, the Commission approved Admissibility Report No. 38/02 taking into account the position of the

applicant and the lack of response by the State. The report was notified to the applicant and the State on October 25, 2002.

8. On May 8, 2003, the Commission held itself available to the parties in order to try and reach a friendly settlement.

9. On October 17, 2003, the applicant requested the Commission to allow the *Centro por la Justicia Global* to stand as co-applicant in the instant case (hereinafter, "the applicants").

10. On October 8, 2003, during its 118th Regular Session, the Commission approved Report on the Merits 43/03, whereby it concluded, *inter alia*, that the State violated the rights embodied in Articles 5 (Right to Humane Treatment), 4 (Right to Life), 25 (Right to Judicial Protection) and 8 (Right to a Fair Trial) of the American Convention, in relation to Article 1(1) thereof, for the inhuman and degrading hospitalization conditions of Damião Ximenes-Lopes, for the violation of the right to humane treatment and his murder; and for breach of the duty to investigate, the violation of the right to access to effective remedies and judicial guarantees associated with the investigation of the events. The Commission recommended that the State should adopt a series of measures aimed at redressing the above-mentioned violations.

11. On December 31, 2003, the Inter-American Commission notified Report on the Merits 43/03 to the State granting two months to notify the Commission on the measures adopted in compliance with the recommendations. That same day, the Commission notified the applicants that the report had been approved and delivered to the State and requested them to notify the Commission of their position regarding the submission of the case to the Inter-American Court.

12. On March 8, 2004, the Commission received a brief from the applicants stating that "it was of utmost importance that the case be submitted to the Inter-American Court[...] since the State, despite the few and sporadic measures adopted in the case, failed to comply with the three recommendations made by the Commission in the report served on the State on December 31, 2003."

13. On March 17 and June 18, 2004, the State requested the Commission to grant time extensions "to implement the recommendations" made on Report on the Merits No. 43/03. Said time extensions were granted. On both occasions, the State expressly and irrevocably acknowledged that the time extensions suspended the term set forth in Article 51(1) of the Convention to submit the case to the Court.

14. On September 23, 2004, the State filed a partial report on the implementation of the recommendations made by the Commission and on September 29, twelve days after the expiration of the term, the State filed another brief containing an answer to the Report on the Merits issued by the Commission.

15. On September 30, 2004, the Commission decided to submit the instant case to the Court.

IV Proceeding before the Court

16. On October 1, 2004, the Commission filed an application before the Court, with documentary evidence attached thereto, and offered to further submit testimony of witnesses and expert witnesses as evidence. The Commission appointed José Zalaquett and Santiago A. Canton as delegates, and Ignacio Álvarez, Ariel Dulitzky, Víctor Madrigal-Borloz and Lilly Ching¹ as legal counsels. On October 29, 2004, the Commission filed the Portuguese version of the application.

17. On November 3, 2004, the Secretariat of the Court (hereinafter "the Secretariat"), after a preliminary examination of the application by the President of the Court (hereinafter "the President"), served the application and its annexes on the State and also notified the State of the term within which it had to answer the application and appoint its attorneys-in-fact to act in the proceedings on its behalf.

18. On November 3, 2004, according to the provisions of Article 35(1) of the Rules of Procedure, the Secretariat served the application on the *Centro por la Justicia Global* in its capacity as representative of the alleged victim and his next of kin² (hereinafter "the representatives") and informed that it must submit a brief of requests, arguments and evidence (hereinafter "the brief of requests and arguments") within two months.

19. On December 3, 2004, the State notified the appointment of Virginia Charpinel-Junger-Cestari as its attorney-in-fact and stated that it reserved the right to appoint, from time to time, other representatives to act in the instant case.³

20. On January 14, 2005, the representatives filed a brief of requests and arguments, attached documentary evidence and offered testimonies and reports of expert witnesses as evidence. The representatives asserted that the State failed to comply with the obligations arising from the guarantee of the rights embodied in Articles 4 (Right to Life) and 5 (Right to Humane Treatment) in relation to Article 1(1) (Obligation to Respect Rights) of the Convention, to the detriment of Damião Ximenes-Lopes. Likewise, the representatives pointed out that the State had violated the rights protected under Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the Convention, and the obligation established in Article 1(1) (Obligation to Respect Rights) thereof, to the detriment of Damião Ximenes-Lopes and his next of kin. Furthermore, they requested the Court to order payment of pecuniary and non-pecuniary damages, the adoption of non-repetition measures and reimbursement of costs and expenses.

21. On March 8, 2005, the State filed a brief containing a preliminary objection, the answer to the application and comments on the brief on requests and arguments (hereinafter "the answer"), and attached the documentary evidence and offered to submit testimony of witnesses and expert witnesses as evidence.

¹ During the proceedings, the Commission appointed new representatives to act before the Court.

² During the proceedings, the representatives of the alleged victims and their next of kin appointed new representatives to act before the Court.

³ During the proceedings, the State appointed new representatives to act before the Court.

22. On March 29, 2005, the State appointed Murilo Vieira-Komniski, Renata Lúcia de Toledo-Pelizón, Carolina Campos de Melo and Cristina Timponi-Cambiaghi as deputy attorneys-in-fact.

23. On May 6, 2005, the representatives and the Commission filed written arguments on the preliminary objection filed by the State. The representatives stated that the objection filed by the State was absolutely untimely and should not be considered by the Court. On the other hand, the Commission affirmed that “[...] there are no reasons why the admissibility issue should be reopened and [that the Court] should dismiss the objection filed by the State; or, in the alternative, [...] that the decision on admissibility made by the Commission in the instant case conforms to the applicable rules of the Convention and, therefore, the objection made by the State must be dismissed.”

24. On September 22, 2005, the President issued an Order requiring Milton Freire-Pereira, a witness for the representatives; and José Jackson-Coelho-Sampaio, Pedro Gabriel Godinho-Delgado, Braz Geraldo Peixoto, Jurandir Freire-Costa, Domingos Sávio do Nascimento-Alves, Benilton Becerra-Júnior and Luís Fernando Farah-Tófoli, witnesses for the State, to render their testimony through affidavits. The President further ordered Eric Rosenthal and João Baptista Breda, expert witnesses proposed by the Commission, and Dalmo de Abreu-Dallari, expert witness proposed by the representatives, to render their expert opinions in the form of affidavits. The President granted a term extending to October 24, 2005 to the parties so that they could submit their affidavits. Furthermore, in the above-mentioned Order, the President summoned the Commission, the representatives and the State to a public hearing to be held at the seat of the Inter-American Court as of November 30, 2005, to hear their final oral arguments on the preliminary objection and possibly on the merits, reparations and indemnities, as well as the testimony of Irene Ximenes-Lopes-Miranda and Francisco das Chagas-Melo, witnesses for the Commission; João Alfredo Teles, witness for the representatives; Luiz Odorico Monteiro de Andrade and Emilio de Medeiros-Viana, witnesses for the State; and Lídia Dias-Costa, expert witness proposed by the representatives. Finally, by this Order, the Court informed the parties that January 9, 2006 would be the final bar date to submit their final written arguments regarding the preliminary objection and possibly on the merits of the case, reparations and indemnities.

25. On October 13, 2005, the State notified the appointment of Milton Nunes-Toledo-Junior as new agent to act for Virgínia Charpinel-Junger-Cestari.

26. On October 24, 2005, the Commission filed the expert opinion by Eric Rosenthal rendered before notary public. On October 27, 2005, the Commission notified its intention not to file the expert opinion of João Batista-Breda.

27. On October 27, 2005, the State filed affidavits with the testimony of José Jackson Coelho-de-Sampaio, Braz Geraldo Peixoto, Domingos Sávio do Nascimento-Alves and Luís Fernando Farah-de-Tófoli. The State further informed that Emilio de Medeiros-Viana was disqualified to render testimony since Brazilian laws “prohibit judges from making comments about any matter pending under their jurisdiction” and submitted an affidavit on his behalf. Consequently, the State requested that Gabriel Godinho-Delgado be allowed to substitute for Emilio de Medeiros-Viana, so that the former stands as witness at the public hearing. Lastly, the State notified its intention not to file the testimonies of Jurandir Freire-Costa and Benilton Becerra-Júnior.

28. On October 28, 2005, the representatives submitted the affidavit of Milton Freire-Pereira.

29. On November 9, 2005, the Commission filed objections to the testimonies of witnesses and expert witnesses presented by the State and the representatives, and on the witness substitution request made by the State. The Commission pointed out that the testimony of José Jackson Coelho-Sampaio “is not actually a testimony [...], but an expert report” and that “he has not been proposed as expert witness by the Court.” Therefore, the Commission suggested that the conclusions and opinions of Coelho-Sampaio should not be taken as evidence and that the Court should not consider other elements of his testimony as sufficient proof of the events in the instant case. Regarding the witness substitution requested by the State, the Commission considered that, in spite of the fact that Emílio de Medeiros-Viana would not stand in the public hearing and taking into account that the State had already presented his written testimony, “what has been actually requested is a change in the form of rendering testimony [...], therefore, the request should be dismissed.” The Commission filed no objections to the testimonies of Braz Geraldo Peixoto, Domingos Sávio do Nascimento-Alves, Luís Fernando Farah-Tófoli and Milton Freire-Pereira, but mentioned that it reserved the right to object them at future procedural stages.

30. On November 9, 2005, the representatives filed objections to the testimonies of witnesses and expert witnesses presented by the Commission and the State. The representatives stated that the request filed by the State for the Court to admit as evidence the testimony of Emílio de Medeiros-Viana should be dismissed on the grounds that he was legally barred from rendering testimony in the instant case. Furthermore, the representatives challenged the substitution of witness Pedro Gabriel Godinho-Delgado for Medeiros-Viana as proposed by the State on the grounds that said substitution was unjustified and generated a procedural imbalance between the parties that could be detrimental. The representatives filed some objections to the testimonies of José Jackson Coelho-Sampaio, Domingos Sávio do Nascimento, Alves Braz Geraldo Peixoto and Luís Fernando Farah-de-Tófoli. On November 11, 2005, the representatives filed the expert opinion of Dalmo de Abreu-Dallari.

31. On November 18, 2005, the State appointed Sérgio Ramos de Matos-Brito as deputy agent of the State and requested the Court to rule, during the public hearing, on the preliminary objection concerning the lack of exhaustion of domestic remedies filed by the State (*supra para. 21*).

32. On November 24, 2005, the Court issued an Order requiring Pedro Gabriel Godinho-Delgado, a witness for the State, to appear as witness in the public hearing to be held on November 30, 2005 (*supra para. 24*).

33. On November 29, 2005, the Court issued an Order requiring its President, Judge Sergio García-Ramírez, Vice-President, Judge Alirio Abreu-Burelli, Judge Antônio Augusto Cançado Trindade, Judge Cecilia Medina-Quiroga and Judge Manuel E. Ventura-Robles to appear in the public hearing to be held in the instant case (*supra para. 24*).

34. On November 30 and December 1, 2005, the Court held a public hearing where the following persons were in attendance: a) For the Inter-American Commission: Florentín Meléndez, Ignacio J. Álvarez, Víctor Madrigal-Borlotz,

Leonardo Jun Ferreira-Hidaka, and Lilly Ching; b) For the representatives: James Louis Cavallaro and Fernando Delgado, and Renata Verônica Côrtes de Lira and Deborah Popowski; c) For the State: Milton Nunes de Toledo-Junior, Francisco Soares Alvim-Neto, Christiano Sávio Barros-Figuerôa, Alfredo Schechtmann and Alexandre Pinto-Moreira, and Maria Luiza Ribeiro-Viotti, Carolina Campos de Melo, Renata Lucia de Toledo-Pelizon and Márcia Adorno-Ramos. The public hearing comprised two parts. During the first part of the public hearing, the State, the Commission and the representatives referred to the preliminary objection filed by the State.

35. On November 30, 2005, the Court rendered Judgment on the Preliminary Objection, whereby it decided:

1. To dismiss the preliminary objection filed by the State concerning the lack of exhaustion of domestic remedies.
2. To continue holding the public hearing convened under the Order of the Inter-American Court of Human Rights dated September 22, 2005, and to proceed with the procedural stages associated with the merits of the case, the reparations and indemnities in the instant case.

[...]

36. The Judgment on the Preliminary Objection was notified to the parties; afterwards, the public hearing proceeded into the second part. At the beginning, the State acknowledged its international responsibility for the violation of Articles 4 and 5 of the American Convention in the instant case (*infra paras.* 63 and 66). To that respect, both the Commission and the representatives referred to the acknowledgment made by the State (*infra paras.* 64 and 65). Then, the Court decided to continue holding the public hearing in order to hear the testimony and expert opinions of the persons summoned to appear before the Court and hear the final arguments on the merits, possible reparations and indemnities, taking into account the acknowledgment of responsibility made by the State. Witness João Alfredo Teles-Melo produced some documents during his testimony. Furthermore, during the public hearing, the representatives and the State furnished some documents.

37. On December 23, 2005, the Commission filed its final written arguments. On January 4, 2006, the Commission submitted the exhibits to said arguments and stated that they contained documents produced after the date of filing of the application and that, therefore, they must be deemed supervening evidence under Article 44(3) of the Rules of Procedure.

38. On January 9, 2006, the representatives and the State submitted their final written arguments.

39. On June 13, 2006, the Secretariat, following instructions of the President according to Article 45 of the Rules of Procedure, requested the Commission the representatives and the State to produce evidence to facilitate the adjudication of the case.

40. On June 22 and 26, 2006, the Commission and the representatives, respectively, submitted evidence to facilitate the adjudication of the case. On June 26 and 28, 2006, the State submitted evidence to facilitate the adjudication of the case.

V Evidence

41. Before examining the evidence offered, the Court will, in the light of the provisions set forth in Articles 44 and 45 of the Rules of Procedure, make some considerations that arise from prior cases heard by the Court and which are applicable to the instant case.

42. As regards to the weighing of evidence, the contradictory principle is applied which safeguards the right of defense of the parties. Such principle is embodied in Article 44 of the Rules of Procedure regarding the time for offering the evidence, in order for the parties to stand on an equal footing.⁴

43. According to the usual practice of the Court, at the commencement of each procedural stage, the parties must refer to the evidence they intend to offer in the first written submission they make. Furthermore, the Court or the President of the Court, exercising the discretionary authority under Article 45 of the Rules of Procedure, may ask the parties to supply additional items as evidence to facilitate adjudication of the case, without thereby affording a fresh opportunity to expand or complement their arguments, unless by express leave of the Court.⁵

44. The Court has also pointed out that, in taking and assessing evidence, the procedures followed by this Court are not subject to the same formalities as those required in domestic judicial proceedings and that admission of certain items into the body of evidence must be effected paying special attention to the circumstances of the specific case and bearing in mind the limits set by respect for legal certainty and for the procedural equality of the parties. Furthermore, the Court has taken into account that international precedents, according to which international courts are deemed to have authority to weigh and appraise evidence based on the rules of a reasonable credit and weight analysis, and has always avoided rigidly setting the *quantum* of evidence necessary to reach a decision. This criterion is especially valid regarding international human rights courts, which, for the purpose of the determination of the international responsibility of a State for the violation of the human rights, are flexible in the assessment and weighing of the evidence submitted for their consideration, regarding any incumbent issues of fact, following the rules of logic and based on experience.⁶

45. On the basis of the aforesaid, the Court will proceed to examine and weigh the documentary evidence filed by the Commission, the representatives and the State in the different procedural stages or as evidence to facilitate the adjudication of the case which has been requested by the President, all of which constitutes the

⁴ Cf. Case of *Baldeón-García*. Judgment of April 6, 2006. Series C No. 147, para. 60; Case of *the Sawhoyamaxa Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, para. 30; and Case of *Acevedo-Jaramillo et al.* Judgment of February 7, 2006. Series C No. 144, para. 183.

⁵ Cf. Case of *Baldeón-García*, *supra* note 4, para. 61; Case of *the Sawhoyamaxa Indigenous Community*, *supra* note 4, para. 31; and Case of *Acevedo-Jaramillo et al.*, *supra* note 4, para. 184.

⁶ Cf. Case of *Baldeón-García*, *supra* note 4, para. 62; Case of *the Sawhoyamaxa Indigenous Community*, *supra* note 4, para. 32; and Case of *Acevedo-Jaramillo et al.*, *supra* note 4, para. 185.

body of evidence in the instant case. In doing so, the Court will follow the rules of reasonable credit and weight analysis, within the applicable legal framework.

A) DOCUMENTARY EVIDENCE

46. The representatives submitted witness statements, the State submitted four witness statements and the Commission filed an expert report, all through affidavits, except for the expert witness proposed by the Commission whose report was rendered before notary public as commanded by the President under Order of September 22, 2005 (*supra* para. 24). Said statements and expert reports are summarized as follows:

1. *Statement by witness proposed by the representatives:*

a) Milton Freire-Pereira, former psychiatric patient

During ten years Milton was a psychiatric inpatient; at present, he is the director of the Instituto Franco Basaglia and a member of the “*Movimento Antimanicomial*” [Anti-Mental Hospitalization Movement]. He still has strong memories of the hospital rooms where he was admitted for treatment and the electroshock he received while in there. His rehabilitation took place outside hospitals.

Milton was really upset when he learned of the demeaning and humiliating death of Mr. Damião Ximenes-Lopes. His death was surrounded by disgraceful rumors regarding to people with mental illness. There is a general belief that no treatment to cure mental disability exists. Such belief is rooted in segregation, closure, violence and lack of social relationships to which such people are subject.

Mental health care in the State changed radically with the implementation of services substituting for the psychiatric hospital model. In the current model, there is multidisciplinary participation of professionals such as psychologists, social workers and occupational therapists. Yet, the hospital-centered asylum model still prevails. This model continues to kill, enslave and isolate forever those people who need mental health care by denying the possibility of rehabilitating and participating in their own treatment.

2. *Statements by witnesses proposed by the State:*

a) José Jackson Coelho-Sampaio, psychiatrist

From 1962 to 1991, psychiatric care in Brazil was provided through the admission of patients in private hospitals, a method instated during the Brazilian military dictatorship. There were six private hospitals in the state of Ceará, all of them associated with the public administration, including Casa de Reposo Guararapes, in Sobral. There was a psychiatric reform movement that resulted in the creation of the Psychosocial Care Center (hereinafter, “*Psychosocial Care Center*”, or “*CAPS*”, for its acronym in Spanish) in the city of Iguatu and the enactment of Law “*Mario Mamede*.” Between 1991 and 1998, several Psychosocial Care Centers were created and, between 1999 and 2000, this assistance model was enhanced. Between 2001

and 2005, the state of Ceará furthered the growth of the Psychosocial Care Centers' network and included the city of Sobral.

Casa de Reposo Guararapes coped with an area of almost one million residents, although it only had one hundred and ten beds. Ambulatory service was poor.

Mental health care changed dramatically after Casa de Resposo Guararapes closed in July 2001. Such date indicates the transition process from a hospital/asylum-oriented assistance model to a decentralized, regionalized approach, with new equipment and the proposal of rehabilitation and social reinsertion of people with mental illness.

b) Domingos Sávio do Nascimento-Alves, M.D. and former Mental Health Coordinator of the Ministry of Health of Brazil

The Instituto Franco Basaglia mainly aims at developing actions to formulate public policies which promote and protect the rights of the mental health service users.

In 1992, an innovative project called "SOS Rights of the Psychiatric Patient" was created, through which mental health care patients, their next of kin and physicians, among others, could make complaints. At the beginning, complaints on bad and abusive treatment were more frequent; at present, complaints have changed and now refer to the exercise of individual rights and the difficulty of people with mental illness to have access to justice. Such changes entail a progress regarding to the complaints on services and professionals.

From 1990, the Ministry of Health issued several rules which regulate psychiatric hospitals practices as part of the Single Health System; promoted the new national registry of system units, and created the hospital psychiatric care group, which pays monitoring visits.

Between 1993 and 1994, nine thousand hospital beds were closed and the death rate in hospitals plunged 12%. Hospitals were replaced by a community service network, that included different Psychosocial Care Centers (CAPS) and aid centers in the health basic network. In the recent past years, the Ministry of Health, through the Psychiatric-Hospital Services Assessment National Program, intervened several institutions and restructured psychiatric care.

The State's mental health policy has focused on the humanization of the assistance of people with mental illness and the defense of their rights.

c) Luís Fernando Farah de Tófoli, psychiatrist for the Department of Social Health Development of the City of Sobral

The influence of the Ximenes-Lopes case in the reorganization of mental health care in Sobral is unquestionable. The Mental Health Integral Care Network in Sobral (RAISM, for its acronym in Spanish) was implemented on July 10, 2000, which is, figuratively speaking, the same date on which the Agreement between Casa de Reposo Guararapes and the Single Health System expired. The Network consists of a General Psychosocial Care Center, a therapeutic residence, a psychiatric care unit in a general hospital, and monitoring and teaching modules concerning the family

health program. This assistance model was awarded several national prizes for its successful experience in mental health care.

In 1998, the General Psychosocial Care Center started functioning with limited capacity until the closure of Casa de Reposo Guararapes, when the Center's responsibility and assistance duties increased. A psychiatry macro-regional ambulatory unit was also created in order to provide ambulatory care to individuals living in other municipalities and to avoid their having to be admitted. Furthermore, the first residential therapeutic public assistance center in northeastern Brazil, called "Residência Terapêutica Lar Renacer," was also created.

Avoidance of psychiatric admission is not always possible. For high-risk cases, an infirmary was built; for the rest of the cases, beds were reserved in the infirmary of an ordinary clinic. The results obtained have been positive, especially those regarding the reduction of the number of days which the patient stays in hospital and the average cost of treatment. Patients' next of kin are invited to accompany inpatients in order to preserve the relationship with them during treatment, which should be as brief as possible.

Sobral network is in several aspects unique and exemplary, and offers a technical, high-quality service for its residents and neighboring towns. Ximenes-Lopes' death led to the reformulation of the mental health care policy in Sobral and to an adequate response to the unsustainable operation conditions of Casa de Reposo Guararapes.

d) Braz Geraldo Peixoto, next of kin of a mental health care system patient, chosen as representative before the Psychiatric Reform National Commission of the Health Ministry and the State Commission of the Department of Health of the State of São Paulo

The facts of Damião Ximenes-Lopes' s case were the result of the former and obsolete psychiatric treatment model, which has shrunk significantly due to the new mental health care policy whose implementation began in the ' 70s. However, it was not until the 2nd National Conference on Mental Health held in 1992, which had the massive participation of patients, patients' next of kin and health professionals, that a reorientation was implemented in the assistance model as part of the State psychiatric reform. In this context, new concepts were developed using workforce trained in the assistance model reorientation approach and qualified to act in the field with that purpose. Likewise, mental health system patients and patients' next of kin are now playing a critical role in determining the mental health policy. Through the approval of Law N° 10,216 in 2001, great progress was achieved, even though such law has not reached all the objectives pursued by mental health system patients and patients' next of kin. In the Brazilian Conference on Psychosocial Care Centers (CAPS), held in June 2004, with the participation of mental health system patients, patients' next of kin and workers, several aspects of the applicable laws were thoroughly analyzed. The efforts made by the Ministry of Health regarding to the mental health care reform are praiseworthy.

3. *Expert report by expert witness proposed by the Commission:*

a) Eric Rosenthal, international expert in human rights of people with mental illness

People with mental illness are subject to bias and strong stigmata, thus constituting a vulnerable group for human rights violations at a global level. Four United Nations Rapporteurs verified that people with mental illness suffer the most perverse forms of discrimination, as well as difficult life conditions, compared with any other vulnerable group of society. These practices, which violate the rights of people with mental illness, follow similar patterns throughout the world. Such people are arbitrarily and unnecessarily segregated from society in psychiatric institutions, where they are subject to cruel, degrading treatment or torture.

It has been proved that most people with mental illness can receive treatment in a safe and respectable manner within their community, and responsibly decide on their own treatment. On many occasions, protectionist rules may cause them great harm by denying the opportunity to make important decisions for their lives. The lack of a specific language regarding to the people with mental illness in human rights international instruments makes it difficult to apply the rules to such people.

As a result of such discriminating practices, people with mental illness do not have the resources or recognition necessary to create organizations to defend their rights at the national and international level.

The Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities is the first human rights international instrument that specifically addresses the issue of people with disabilities and represents a priceless commitment by Latin American States to secure that they will enjoy the same rights the rest of the community is endowed with. The United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care are the broadest human rights rules concerning mental health treatment and assistance. Such principles are particularly useful as guidelines for the interpretation of the rights established in human rights treaties.

International human rights law acknowledges that individuals with mental illness, who are admitted in psychiatric institutions, as was Ximenes-Lopes's case, have the right to informed consent and, consequently, the right to refuse treatment. Exceptionally, involuntary treatment may be justified in emergency cases, when a doctor deems it necessary in order to prevent an imminent risk for the individual or third parties. In non-emergency cases, involuntary treatment is only justified by the approval of an independent doctor. In Ximenes-Lopes' s case, there was no imminent or immediate risk, and there was no information as to a decision issued by an independent doctor. Due to the inexistence of these conditions, Damião Ximenes-Lopes had the right to refuse treatment, and any attempt to apply involuntary treatment would result in a violation of the human rights protected under international law.

Given the potentially dangerous and painful nature of the adverse effects of psychotropic substances, the unjustified and constrained use of such drugs in violation of international standards must be considered a form of cruel and degrading treatment and an infringement of Article 5(2) of the American Convention on Human Rights.

Physical confinement⁷ in psychiatric treatment, when properly used, aims at preventing any harm that the patient may cause to himself/herself or to third parties. Causing harm to the patient with the excuse of controlling his/her emotions is a clear indicator of the personnel's inadequate training in the use of correct confinement methods.

In the case of Ximenes-Lopes there is no evidence indicating that he was an imminent danger for himself or third parties. The attempt to use a less aggressive method to control a potentially violent incident was not proved. Therefore, the use of any form of physical strength in this case was illegal. Once Damião Ximenes-Lopes was restrained, with his hands tied on the back, the State had the supreme duty to protect him due to his extreme condition of vulnerability. The excessive use of physical strength and the beating constituted a violation of his right to humanitarian assistance. There are other alternatives that may be resorted to before making use of strength or deciding a patient's isolation. Mental health programs should strive to maintain a caring environment and culture which minimizes the use of such methods. The unjustified and excessive use of strength in this case constitutes a cruel practice and a degrading treatment.

When isolation and strength are used as punishment or coercion methods or with improper objectives, violation of human rights is even more serious. Where use of strength with improper purposes has caused great pain or physical or mental suffering, it may constitute torture. Hitting a psychiatric patient or causing him/her any kind of harm or suffering is always unnecessary. The fact that Ximenes-Lopes was unarmed while held under the custody of the State shows that such an action was not proportional to the potential threat he could pose. Given the extreme vulnerability of individuals undergoing psychiatric crises, State authorities should have greater responsibility in their protection. The beating suffered by Damião Ximenes-Lopes - and his subsequent death - could have been avoided had the State complied with its obligation to provide an institution with officers qualified to treat his mental illness.

B) TESTIMONIAL AND EXPERT EVIDENCE

47. On November 30 and December 1, 2005, the Court held a public hearing where the witnesses proposed by the Inter-American Commission, by the representatives and the State gave testimony and the expert witness proposed by the representatives submitted the corresponding expert report (*supra* para. 24). The following is a summary of the relevant part of said testimonies and expert report:

1. *Testimony of witnesses for the Commission*

a) Irene Ximenes-Lopes-Miranda, sister of Damião Ximenes-Lopes

Damião Ximenes-Lopes had been admitted to hospital in 1995, and he was admitted again in 1998. During the last hospitalization term, this witness noticed that his brother had cuts and injuries in his ankles and knees, and for this reason she asked

⁷ Confinement is a form of restraint, i.e. 'any word of action interfering with a patient's capacity to make decisions or restricting his/her freedom of movement.' For the purposes of the instant Judgment, the Court will use the term 'confinement' to designate the physical restraint to which Damião Ximenes-Lopes was subject.

the officer of Casa de Reposo Guararapes for an explanation. The officer stated that the injuries had resulted from Ximenes-Lopes' attempt to escape from the premises. The witness believed this.

On October 4, 1999, the witness's mother visited Damião Ximenes-Lopes and found that he was agonizing. She asked for help to doctor Francisco Ivo de Vasconcelos because she thought her son was going to die due to his health condition. The doctor, however, did not act in response to her requests. Ximenes-Lopes died that same day. His body had torture signs; his fists were torn and bruised, and his hands were also hurt, with fingernail marks, and part of his nose had been beaten. The cause of his death was described by the doctors as "death by natural causes, cardiac arrest," with no further indications. Then, the body of Damião Ximenes-Lopes was taken to the city of Fortaleza for an autopsy, which concluded that he had had a "death for undetermined causes." His family did not believe such expert analysis since it considered that there had been some sort of manipulation and omission of the truth. As a result of her brother's case, this witness found many people who had suffered bad treatment or whose next of kin had been beaten at Casa de Reposo Guararapes, but the families and victims did not want to report the events because they were afraid of having to confront the police and the hospital.

The witness indicated that among the many relatives of Damião Ximenes-Lopes, his mother and his father, as well as the witness herself and his brother Cosme Ximenes-Lopes, were affectionately the closest to him. The witness suffered greatly, and she and her family struggled to seek justice. The witness, who by the time the events took place had a newborn daughter, stopped producing breast milk due to the emotional impact sustained and could not breastfeed the baby anymore. She suffered from depression for three years and lost any motivation to work. She lost her job at the Municipality Hall twenty-six days after her brother's death. She had nightmares related to her brother's death. She demanded justice for her dead brother, and she sworn that her soul would not rest until justice was done.

Cosme Ximenes-Lopes felt really identified with Damião Ximenes-Lopes because he was his twin brother. They were really close and when he died, Cosme Ximenes-Lopes was in shock: he needed medical assistance, suffered from depression, and stopped working. The witness had to help provide for her brother's family for some time while he recuperated. The witness' s father, who was separated from the alleged victim' s mother, never broke the family ties with his son Damião Ximenes-Lopes and grieved over his death. He said that it "[was] not easy to lose a [son that was still so] young." He had a desire for revenge for a long time.

The mother of Damião Ximenes-Lopes still bears the consequences of the death of her son. Her life was completely ruined; to this day, she suffers from depression and claims that she wants to die. She lost the will to live, she had nervous gastritis and, as a result, a duodenal ulcer that was difficult to treat because she developed a huge fear to hospitals. She appears to suffer from a certain "life defense psychosis" she refuses to touch any living thing, such as animals or insects, because she does not want to kill them. Everything reminds her of the death of her son Damião Ximenes-Lopes.

On the day the witness's brother died, the family reported the death at the Police Station of the Seventh Region in Sobral (hereinafter, "the Regional Police Station of Sobral"), but since no investigation was commenced, they filed a complaint with the

Human Rights Commission of the Legislative Body. The death of Damião Ximenes-Lopes still remains unpunished in every respect. The proceedings have taken a lot of time.

Regarding to the criminal proceedings, this witness stated that some elements were missing from the case file; mainly, the testimonies rendered by Francisco Ivo de Vasconcelos, João Alves da Silva and Sebastião Vieira-Filho, which the witness consider to be important since such testimonies indicate that both the hospital and the State are responsible for the death of Ximenes-Lopes.

The witness's mother, as the entire family, refuses to receive the life pension offered by the State since she believes that it does not redress the damage caused. They consider the State's proposal to be humiliating. The witness appreciates the fact that the Psychosocial Care Center (CAPS) was named after her brother, but she does not see the gesture as an indicator of justice, since that was the least they could do.

b) Francisco das Chagas-Melo, former patient of Casa de Reposo Guararapes

During the time he was hospitalized in Casa de Reposo Guararapes, he was a victim of violence but did not report it to the police. He was aware of other violence and death cases in Casa de Reposo Guararapes, although no investigations were carried out. He identified the people who committed acts of violence as Eliésio, Cosmo, Carlão and Nonato. This witness heard that Carlão was a very aggressive person and also saw Cosmo perform acts of violence and masturbate while looking at naked women. Casa de Reposo was a place tainted with violence, abuse of power, and lacking any kind of assistance to patients.

2. *Testimony of witness proposed by the Representatives*

a) João Alfredo Teles-Melo, who at the time the events occurred was a representative in the Legislative Body of the state of Ceará, where he presided over the Human Rights and Citizenship Commission. At present, he is a representative in the Federal Congress.

The Human Rights and Citizenship Commission is an office that receives complaints, claims and petitions filed by residents and directed to the applicable authorities. The commission has the duty to monitor the follow-up of such human rights-related claims through reports or public hearings. In the case of Damião Ximenes-Lopes, his sister, his mother, and other inpatients of Casa de Reposo Guararapes were invited to provide informative statements. Official letters and motions requesting measures both in the administrative and disciplinary area were sent to different authorities, including police officers and members of the judiciary, the Medicine Council, the Municipality of Sobral, through the Secretariat of Health of the State and the Secretariat of Health.

In the visit made to Casa de Reposo Guararapes, the witness could see that the institution was in very bad hygiene conditions, and the inpatients were neglected, with no one in charge of the medical or administrative areas. The State had not adequately inspected Casa de Reposo Guararapes.

A delay of more than five years in the proceedings instituted to investigate the death of Damião Ximenes-Lopes shows that Brazilian courts are slow and biased. The pressure of the political and economic power has strong influence on the judicial system. On many occasions these powers act as accomplices - since they are very strong, they can determine whether there will be a trial or not.

In the case of Damião Ximenes-Lopes, the witness received reports on the investigations carried out by the Regional Medicine Council, among others. However, he never received a response on the disciplinary investigation conducted regarding to the chief of police, who had allegedly made evidence disappear, or on the fact that the investigation was not commenced until November 7 or 8, 1999, although the death occurred on October 4, 1999. It took three years to the Attorney General's Office to furnish additional accusation related to the complaint. There was an unjustified delay. The witness considers that the death of Damião Ximenes-Lopes, a case with such great implications and with such an amount of evidence, cannot be delayed so extensively and thus he believes that the case may end up unresolved and alleged offenders go unpunished due to the application of the statute of limitations.

After Damião Ximenes-Lopes' death, mental health care in the city of Sobral progressed, but it is still far from reaching the ideal concept of the psychiatric system reform.

3. *Testimony of witnesses proposed by the State*

a) Luiz Odorico Monteiro-de-Andrade, Municipal Secretary of Health of Fortaleza, who at the time Damião Ximenes-Lopes died was the Secretary of Social Development and Health of the city of Sobral.

The hospital where Damião Ximenes-Lopes died had been sanctioned on several occasions and a mental health system was being implemented so that such hospital could be closed. Since it was a very important regional hospital, closing it immediately was not easy. As soon as they had knowledge of Damião Ximenes-Lopes' death, they created an administrative investigation commission, which verified a series of problems at the hospital. After that, the institution was immediately intervened in order to control inpatients. The commission made a full diagnosis of each inpatient's mental condition; and those patients residing in the city of Sobral and associated with the Family Health Program were gradually discharged, with domiciliary and community support. Thereafter, the hospital was closed.

From January 1, 1997, a series of administrative restructuring activities began in the Municipal Government to adjust the Single Health System's policies. By the end of 1998, the Psychosocial Care Center, which provides ambulatory care and daily care to patients with mental illness, had been created. This center has evolved, and now it has a treatment for inpatients with acute mental disorders in general hospitals. There are also CAPS for general disorders and one CAPS for individuals with alcohol and drug-related problems. A recently opened CAPS was named after Damião Ximenes-Lopes to pay homage to him.

At present, health care quality is much better than in 1999. Since the decentralization, an intense process of reduction in the number of hospitals and asylums has taken place; and psychiatric care in Brazilian municipalities has become

more humanized. The Municipality of Sobral is considered a successful example in this field, not only from the local point of view, but also from the national and international perspective. The Municipality has been awarded several prizes; among them, the award of sanitation specialist David Capistrano and other social inclusion recognition awards. The State has constituted a benchmark in the reduction of hospitalizations and represents the progress against Latin American asylums.

The creation of the CAPS was the starting point for the establishment of a structure based on the interdisciplinary teamwork of doctors, social workers, psychologists, pharmacists, therapists. The work with patients is now aimed at their economic reintegration into society, while in the past they were doomed to live in asylums.

b) Pedro Gabriel Godinho-Delgado, National Coordinator of the Mental Health Program of the Ministry of Health

Since the death of Damião Ximenes-Lopes, 19,000 psychiatric hospital beds have been closed in institutions similar to Casa de Reposo Guararapes within the State. Furthermore, between 1999 and 2005, 500-600 outpatient services were created, with the capacity of coping with serious mental health situations without hospitalization being necessary. Other types of services were also created, such as therapeutic residences qualified to treat less serious cases. This was a period in which Brazil faced an important controversy on the life conditions of psychiatric system patients.

In 2001, Law No. 10,216 was passed. Its main purpose is to defend mental patients' rights based on the conversion of the health care model of institutions like Casa de Reposo Guararapes into an open health care network focused on the community, the external control of involuntary psychiatric admissions, and the United Nations Principles for the Protection of Persons with Mental Illness of 1991.

In 1999, approximately 90% of the financial resources that the public health system devoted to the psychiatric care and mental health field were used for the Central Hospital Model, and the external network received only 10% of the resources. Today, the resources devoted to mental health in the State have globally increased: 63% is still devoted to hospitals with expensive equipment, while 37% to 40% is already being devoted to outpatient services. Today, the State is experiencing a transition process towards a psychiatric care model based on the patients' rights, integral care, respect for their individual rights, and participation of the patients' next of kin in their treatment.

Hospitals are assessed through an Annual Assessment Program to which all of them are subject. Associations of health municipal councils, state councils, next of kin and users also participate on behalf of the society. The policy change process consists in reducing large hospitals to obtain smaller hospitals, which tend to preserve and respect patients' rights to a greater extent.

The document designated "Principles of Brasilia", which contains the evaluation of the Caracas Declaration, confirms that there was progress in several countries and mentions Brazil as an example of a country with relevant experience in the matter.

In 1999, the mental health care modernization process was underway. Monitoring of the Single Health System is not based on complaints, but on the regular supervision

of the services. In this sense, the measures adopted minimize potential human rights violations. Complaints regarding to the situation of patients with mental illness are rapidly investigated. The number of violations of patients' human rights in the State has decreased because hospitals are now smaller and the institutions that have superseded them are more responsive and approachable to social control and the participation of patients' next of kin.

4. *Expert reports by expert witnesses proposed by the representatives*

a) Lídia Dias-Costa, psychiatrist

She has been an expert witness in the case of Mr. Ximenes-Lopes since November 1999. She attended the exhumation of Mr. Damião Ximenes-Lopes' corpse, which had started when the corpse was undergoing the process of decomposition, whereby it was reduced to the skeleton. During the exhumation of Mr. Damião Ximenes-Lopes' corpse, she could verify that his brain had been opened as it is done in autopsies, but she found no reason why this had not been reported or described in the autopsy record drawn up in 1999. According to the expert witness, it is a routine procedure and there is no reason why the brain should not be examined or the findings resulting from the examination should not be recorded. Furthermore, she stated that a diagnosis of violent death caused by a skull and brain traumatism could be established based on the patient's clinical evolution.

There are domestic and international standards regarding the right treatment of people with mental health disabilities, which are the principles for the "treatment of people with mental health disabilities and the improvement of health care," published by the United Nations in 1991. These principles were accepted by the State by virtue of Federal Resolution No. 1,407.

The expert witness visited the *Casa de Reposo Guararapes* (Guararapes Rest Home) in May 2000, when the institution was under government intervention, and found that some of the employees accused in the criminal proceedings were working there. The *Casa de Reposo Guararapes* was not in operating conditions.

Containment techniques applied in the *Casa de Reposo Guararapes* could not be deemed to be medical procedures, since the patients or other persons admitted in said center were asked to contain other patients when these appeared to be in a state of agitation. Containment techniques were applied violently. This was described by the professionals working at the *Casa de Reposo Guararapes*, among them Dr. Francisco Ivo de Vasconcelos, who stated that he used to get to the health center to find that the patients had been tied by the nurses and that he used to order that they be untied. This was one of the routine situations at the above health center, besides other violent acts. However, it is possible to contain patients without causing them any bruises, by using technical procedures which allow preventing them. Unfortunately, under the Brazilian health system there are many patients who suffer this type of containment, which amounts to a cruel and inhuman treatment.

At present, people suffering from problems similar to those suffered by Mr. Damião Ximenes-Lopes, according to the care they receive may live with other people, have access to a dwelling place and food, and live long. It is not their mental disabilities which make it difficult to live with them, but their living conditions, as it happens with people in general.

The expert witness can conclude that Mr. Damião Ximenes-Lopes had a violent death caused by extrinsic agents as evidenced by the victim's traumatic bodily lesions. Today, doctors can avail themselves of the Istanbul Protocol, which offers guidelines on how to typify bodily lesions of people who had a dubious death. According to the above Protocol, the lesions found on the body of Mr. Ximenes-Lopes are deemed to be typical of traumas which are commonly detected on the body of people who were tortured. According to the examination made by the forensic experts from Fortaleza City due to the insistence of the prosecutor to the case, the death of Mr. Damião Ximenes-Lopes was caused by the traumatic lesions which, according to the expert witness, might have been caused by a punch, blows with stones, or kicks. The autopsy carried out by the Forensic Medical Institute revealed that the corpse showed echimosis, excoriations, and hematomas, which are lesions suggesting that the victim suffered a bodily traumatism, and which were later established as caused by some blunt object.

C) EVIDENCE ASSESSMENT

Documentary Evidence Assessment

48. As in other cases,⁸ the Court recognizes the evidentiary value of the documents submitted by the parties at the appropriate procedural stage, which have neither been disputed nor challenged, and whose authenticity has not been questioned, whereby the Court finds them helpful for the adjudication of the instant case.

49. The Court finds helpful for the adjudication of the instant case the documents submitted by the representatives,⁹ the State¹⁰ and the witness João Alfredo Teles-Melo¹¹ at the public hearing held on November 30 and December 1, 2005, which all the parties attending such hearing were informed of, as well as the documents tendered by the Commission as annexes to the closing written arguments¹² (*supra* paras. 36 and 37), whereby the Court admits them into the body of evidence pursuant to Article 45(1) of the Rules of Procedure.

⁸ Cf. *Case of Baldeón-García*, *supra* note 4, para. 65; *Case of the Sawhoyamaya Indigenous Community*, *supra* note 4, para. 36; and *Case of Acevedo-Jaramillo et al*, *supra* note 4, para. 189.

⁹ Namely: a copy of the "*Recomendação de Aditamento da Denúncia*" of March 27, 2001; official letter No. 155/05 JG/RJ, addressed by *Justicia Global* to the Coordinator of the Mental Health Program of the Health Ministry on November 18, 2005; official letter No. 154/05 JG/RJ, addressed by *Justicia Global* to the Vice-president of the Federal Council of Psychology on November 18, 2005; official letter No. 08/2000, Recommendation of the Center for the Operational Support of Socially Marginalized Groups under the Office of the Attorney General to the administrative head of the *Casa de Reposo Guararapes* (Guararapes Rest Home) of May 25, 2000, and Addition Record No. 013/99 to the agreement No. 053007/98 entered by the Municipality of Sobral and the *Casa de Reposo Guararapes* on December 26, 1999.

¹⁰ Namely: booklet entitled "*Como encaminhar demandas de saúde mental em Sobral. Orientações ao Programa Saúde da Família*", Secretariat of Health and Social Development, Sobral; and booklet entitled "*CAPS-Centro de Atenção Psicossocial Damião Ximenes-Lopes*", Secretariat of Health and Social Development, Sobral.

¹¹ Namely: book entitled "*Relatório da cidadania, Atividades da Comissão de Direitos Humanos e Cidadania da Assembléia Legislativa do Ceará - 1999.*"

¹² Namely: statement given by Francisco das Chagas-Melo at the Court of Ipueiras on March 2, 2005; statement given by Albertina Viana-Lopes at the Court of Varjota on April 5, 2005; and summons issued by the Court of Sobral serving notice of the hearing set for November 17, 2005.

50. By virtue of the provisions of Article 45(1) of the Rules of Procedure, the Court admits into the body of evidence the documents tendered as part of the evidence required by the Court, the Commission,¹³ the representatives,¹⁴ and the State¹⁵ (*supra* para. 40) as evidence to facilitate the adjudication of the instant case.

51. Furthermore, the Court finds helpful for the adjudication of the instant case the documents mentioned below and therefore it admits them into the body of evidence pursuant to the provisions of Article 45(1) of the Rules of Procedure: Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by UN General Assembly Resolution No. 46/119 of December 17, 1991; Standard Rules on the Equalization of Opportunities for Persons with Disabilities, approved by UN General Assembly Resolution No. 48/96 of December 20, 1993; Pan American Health Organization, Caracas Declaration, adopted by the Conference on the Modernization of Mental Health Legislation in Latin America of November 14, 1990; World Psychiatric Organization (WPA), Madrid Declaration on Ethical Standards for Psychiatric Practice, approved by WPA General Assembly Resolution of August 25, 1996 as revised on August 26, 2002; Division of Mental Health and Prevention of Substance Abuse of the World Health Organization. Ten Basic Principles of Mental Health Care Law, 1996; Committee on Economic, Social and Cultural Rights, General Comment 5, "Persons with Disabilities"; Declaration on the Rights of Mentally Retarded Persons adopted by UN General Assembly Resolution, Document A/8429 of 1971; World Program of Action concerning Disabled People, adopted by UN General Assembly Resolution 37/52, Document A/37/51 (1982); Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf/E (2002) 1 – Rev. 2004; World Psychiatric Association (WPA), Declaration of Hawaii/II, adopted by the WPA General Assembly on 10th July 1983; American Hospital Association/National Association of Psychiatric Health Systems, Guiding Principles on

¹³ Namely: Administrative Decision No. 224/92 of the Ministry of Health of January 29, 1992; Administrative Decision No. 407/92 of the Ministry of Health of June 30, 1992; Administrative Decision No. 147/94 of the Ministry of Health/ SASS (Secretariat of Health and Social Development) of August 25, 1994; Administrative Decision No. 145/94 of the Ministry of Health of August 29, 1994; Resolution No. 1407/94 of the Federal Council of Medicine of September 30, 1957; Resolution No. 1.408/94 of the Federal Council of Medicine of June 8, 1994 on the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care; and Code of Medical Ethics.

¹⁴ Namely: Administrative Decision SNAS No. 224/92 of January 29, 1992; Administrative Decision /SAS No. 147/94 of August 25, 1994; Administrative Decision /SAS No. 145/94 of the Ministry of Health of August 25, 1994; Resolution of the Council of Medicine No. 1407/94 of September 30, 1957; Resolution of the Federal Council of Medicine No. 1.408/94 of June 8, 1994 on the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care; Code of Medical Ethics; payment receipts regarding the life pension benefit received by Mrs. Albertina Viana-Lopes; and list of procedural update of the criminal and civil proceedings regarding the death of Damiao Ximenes-Lopes, printed from the *web* page of the Court of Justice of the state of Ceará.

¹⁵ Namely: document entitled "*Legislação em Saúde Mental 1990-2004*", publication of the Ministry of Health of Brazil, including, among others, Administrative Decision SNAS No. 224/92 of January 24, 1992; Administrative Decision SAS No. 147/94 of August 25, 1994; Administrative Decision SAS No. 145/94 of August 25, 1994; record on the inspection conducted by the Sanitary Surveillance Agency, Secretariat of Health and Social Development, at the *Casa de Reposo Guararapes* (Guararapes Rest Home) on October 21, 1999; record on the commencement of proceedings No. 002/99 issued by the Control and Evaluation Coordination Department on October 20, 1999; record of the hearing held at the Third Chamber of the Court of Sobral on November 17, 2005; record of the hearing held at the Third Chamber of the Court of Sobral on December 1, 2005; "payment receipts" regarding the life pension benefit received by Mrs. Albertina Viana-Lopes, issued by the State of Ceará, printed from *Internet* on June 21, 2006; and Law No. 13.491 of June 16, 2004.

Restraint and Seclusion for Behavioral Health Services, 25 February 1999; American Geriatrics Society Position Statement: Guidelines For Restraint Use, Last Updated January 1, 1997, and American Medical Association, Guidelines for the Use of Restraints in Long-Term Care Facilities, June 1989.

52. Regarding the sworn statements given by Milton Freire-Pereira (*supra* para. 46(1)(a)), José Jackson Coelho-Sampaio, Domingos Sávio do Nascimento-Alves, Luís Fernando Farah-Tófoli and Braz Geraldo-Peixoto (*supra* paras. 46(2)(a), 46(2)(b), 46(2)(c) and 46(2)(d)), which were signed by the witnesses and legalized by a Notary Public, but which were not given before a public official whose acts command full faith and credit, the Court admits them insofar as they are in accordance with the object set forth in Order of the President issued on September 22, 2005 (*supra* para. 24) and assesses them as a whole with the rest of the body of evidence, applying thereto the standards of reasonable credit and weight analysis. In this regard, the Court takes into consideration the comments submitted by the Commission as to the statement given by Mr. José Jackson Coelho-Sampaio (*supra* para. 29). On other occasions the Court has admitted sworn statements which were not given before a public official vested with the authority to confer full faith and credit to the acts passed before him provided that legal certainty and procedural equality between the parties are not impaired.¹⁶

53. Regarding the expert report submitted by Mr. Eric Rosenthal (*supra* para. 46(3)(a)), the Courts admits it insofar as it is in accordance with the object set forth in Order of the President issued on September 22, 2005 (*supra* para. 24) and assesses it as a whole with the rest of the body of evidence, applying thereto the standards of reasonable credit and weight analysis. On other occasions the Court has admitted expert reports which were not given before a public official vested with the authority to confer full faith and credit to the acts passed before him, provided that legal certainty and procedural equality between the parties are not impaired.¹⁷

54. Regarding the sworn statement given by Mr. Emilio de Medeiros-Viana, whose signature was legalized by a Notary Public, and considering the statements made both by him and by the State in that according to the Brazilian legislation he was disqualified to give testimony, the Court does not admit the statement submitted by the State in that regard (*supra* para. 27) into the body of evidence in the instant case. As to the expert report given by Mr. Dalmo de Abreu-Dallari, it was time-barred for it was submitted on November 11, 2005, that is, fourteen days after the expiration of the period established for that purpose, whereby the Court shall not admit it into the body of evidence in the instant case (*supra* para. 30).

55. As to the press documents submitted by the representatives, the Court considers that they may be assessed insofar as they refer to public and notorious facts or statements given by State officials or when they confirm aspects related to the case in point.¹⁸

Testimonial and Expert Evidence Assessment

¹⁶ Cf. *Case of Baldeón-García*, *supra* note 4, para. 66; *Case of the Sawhoyamaxa Indigenous Community*, *supra* note 4, para. 42; and *Case of Acevedo-Jaramillo et al*, *supra* note 4, para. 191.

¹⁷ Cf. *Case of Baldeón-García*, *supra* note 4, para. 67; *Case of the Sawhoyamaxa Indigenous Community*, *supra* note 4, para. 42; and *Case of Acevedo-Jaramillo et al*, *supra* note 4, para. 192.

¹⁸ Cf. *Case of Baldeón-García*, *supra* note 4, para. 70; *Case of the Sawhoyamaxa Indigenous Community*, *supra* note 4, para. 45; and *Case of Acevedo-Jaramillo et al*, *supra* note 4, para. 199.

56. Likewise, the Court admits the statement given by Mrs. Irene Ximenes-Lopes-Miranda before the Court (*supra* para. 47(1)(a)), insofar as it is in accordance with the object thereof and assesses it as a whole with the rest of the body of evidence. The Court considers that since the above mentioned witness is a next of kin of the alleged victim, her statement cannot be assessed separately for she has a direct interest in the outcome of the case, and therefore, must be assessed as a whole with the rest of the body of evidence. The statements given by the alleged victims' next of kin may be helpful in that they provide useful information on the alleged violations and the consequences thereof.¹⁹

57. The Court considers that the statements given by Francisco das Chagas-Melo (*supra* para. 47(1)(b)), João Alfredo Teles-Melo (*supra* para. 47(2)(a)), Luiz Odorico Monteiro-de Andrade (*supra* para. 47(3)(a)), Pedro Gabriel Godinho-Delgado (*supra* para. 47(3)(b)), as well as the expert report submitted by Ms. Lídia Dias-Costa (*supra* para. 47(4)(a)) may be helpful to facilitate the adjudication of the instant case and, therefore, it admits them into the body of evidence, applying thereto the standards of reasonable credit and weight analysis.

58. Therefore, the Court shall assess the evidentiary value of the documents, statements, and expert opinions submitted by the parties. Furthermore, the evidence tendered during the various procedural stages has been admitted as a whole with the rest of the body of evidence in the instant case.

VI PRIOR CONSIDERATIONS

59. The Court shall now proceed to rule on: a) the scope of the acknowledgement of international liability made by the State; b) the grounds of the State's duties within the framework of the State's liability resulting from the violations to the American Convention, and c) the special attention the States must devote to the persons with mental health disabilities due to their particular vulnerability.

a) *SCOPE OF THE ACKNOWLEDGEMENT OF INTERNATIONAL LIABILITY MADE BY THE STATE*

60. Article 53(2) of the Rules of Procedure provides that

[i]f the respondent informs the Court of its acquiescence to the claims of the party that has brought the case as well as to the claims of the representatives of the alleged victims, their next of kin or representatives, the Court, after hearing the opinions of the other parties to the case, shall decide whether such acquiescence and its juridical effects are acceptable. In that event, the Court shall determine the appropriate reparations and indemnities.

61. In the exercise of its adjudicatory jurisdiction, the Inter-American Court applies and interprets the American Convention and, when a case has been

¹⁹ Cf. *Case of Baldeón-García*, *supra* note 4, para. 66; *Case of the Sawhoyamaya Indigenous Community*, *supra* note 4, para. 37; and *Case of Acevedo-Jaramillo et al*, *supra* note 4, para. 203.

submitted to the jurisdiction thereof, is empowered to decide on the international liability of a State Party to the Convention as a result of the violation of the provisions thereof.²⁰

62. In the exercise of its powers to guarantee the international effective judicial protection of human rights, the Court may determine if the acknowledgement of international liability made by a respondent State offers sufficient grounds, under the terms of the American Convention, whether to continue hearing the merits of the case or discontinue it, and to determine the possible reparations and legal costs thereof. To that purpose, the Court shall assess the facts set forth in each specific case.²¹

63. At the public hearing held on November 30, 2005 (*supra* paras. 34 and 36) the State argued that:

- a) it recognizes the relevance of the complaint filed by the Inter-American Commission as to the violation of Articles 4 (Right to Life) and 5 (Right to Personal Integrity) of the American Convention;
- b) it recognizes the facts alleged in the case regarding the death of Mr. Damião Ximenes-Lopes, and the lack of prevention necessary to overcome the conditions that allowed such an event to happen, since at that time the State mental health care system was precarious, which constituted a violation of Article 4 of the Convention;
- c) it recognizes the facts alleged in the case regarding the mistreatment suffered by Mr. Damião Ximenes-Lopes before his death, which resulted in a violation of Article 5 of the Convention;
- d) it requests that the dispute over such Articles be discontinued and that the other relevant matters be continued;
- e) it does not recognize the request for reparations resulting from the violation of Articles 4 and 5 of the Convention, which remains open to debate and
- f) it does not recognize the violation of the rights enshrined in Articles 8 and 25 of the Convention.

64. For its part, at the same public hearing the Inter-American Commission argued that it recognized "the positive, ethical, responsible, and constructive attitude adopted by the [... State] in acknowledging its liability for the violation of Articles 4 and 5 [of the Convention]." The Commission further stated that "[s]uch an attitude is not only an important contribution to the outcome of the instant case, but also a very important precedent in Brazil and in the region on how the States should act responsibly when the facts are unquestionable and so is the responsibility of the State as regards to human rights within the framework of the Inter-American System." Finally, the Commission stated that it considered that the dispute over both the factual and legal issues regarding Articles 4 and 5 of the Convention had come to an end.

²⁰ Cf. *Case of Baldeón-García*, *supra* note 4, para. 37; *Case of Blanco-Romero et al.* Judgment of November 28, 2005. Series C No. 138, para. 54; and *Case of García-Asto and Ramírez-Rojas*. Judgment of November 25, 2005. Series C No. 137, para. 173.

²¹ Cf. *Case of Baldeón-García*, *supra* note 4, para. 38; *Case of Gómez-Palomino*. Judgment of November 22, 2005. Series C No. 136, para. 28; and *Case of the Mapiripán Massacre*. Judgment of September 15, 2005. Series C No. 134, para. 65.

65. In turn, at the same public hearing the representatives argued that they recognized the importance of the statement made by the State regarding the international liability thereof for the violation of Articles 4 and 5 of the American Convention.

66. Later on, in its closing arguments, the State claimed that as a clear proof of its actual commitment to the protection of human rights, for the sake of ethics it had chosen to admit its failure to properly supervise the operation of *Casa de Reposo de Guararapes* during the period in which Mr. Damião Ximenes-Lopes was hospitalized there. In view of the patient's death and the mistreatment he had suffered, the State acknowledged its international liability for the violation of Articles 4 and 5 of the Convention (*supra* paras. 36 and 63).

67. In its closing arguments, the Commission argued that due to the acknowledgment of liability made by the State, there was no dispute over the facts set forth in the complaint regarding the death of Mr. Damião Ximenes-Lopes, among which paragraphs 38 to 88 shall be deemed to be included, as well as paragraphs 147 to 168, regarding the legal grounds alleged in the complaint. The Commission further stated that the truthfulness of the facts regarding the death of Mr. Ximenes-Lopes was confirmed, as well as of those regarding the inhuman and degrading hospitalization conditions resulting from the State's failure to fulfill its supervisory and preventive functions, as it was claimed in the complaint (*supra* paras. 2, 16, and 37).

68. For their part, in their closing arguments the representatives alleged that they understand that the Court accepted the State's liability under the terms set forth in the complaint filed by the Inter-American Commission (*supra* para. 38).

1. *Regarding the facts*

69. In view of the acknowledgment of liability made by the State, the Court considers that the facts set forth in paragraphs 38 to 88 of the complaint filed by the Inter-American Commission in the instant case are no longer in dispute, on the one hand, and, that the State has not challenged the facts set forth in the complaint regarding the State's duty to conduct an investigation of the facts regarding the death of Mr. Damião Ximenes-Lopes alleged by the Commission and the representatives and to identify and punish those responsible for his death, on the other.

70. In this regard, the Court deems it relevant to open a chapter regarding the facts set forth in the instant case, including both the facts acknowledged by the State and those among the elements that are in the record which have been proven (*infra* paras. 112 to 112(71)).

2. *Regarding the legal claims*

71. In view of the partial acknowledgment of international liability made by the State, the Court deems the facts set forth in paragraphs 112 to 112(71) of this Judgment to be proven, and based thereon and taking into consideration the

circumstances of the case, it proceeds to define the various violations to the rights enshrined in the alleged articles.

72. The Courts considers it relevant to admit the acknowledgment of international liability made by the State for the violation of the rights enshrined in Articles 4 (Right to Life) and 5 (Right to Personal Integrity) of the American Convention, as regards to Article 1(1) (Obligation to Respect Rights) thereof, to the prejudice of Mr. Damião Ximenes-Lopes.

73. The Court notes that the State has not challenged the facts set forth in the complaint regarding its duty to conduct an investigation of the facts alleged regarding the death of Mr. Damião Ximenes-Lopes, and to identify and punish those responsible for his death; instead, it has challenged their classification, whereby the State considers that it is not liable for the alleged violation of the rights enshrined in Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, regarding Article 1(1) (Obligation to Respect Rights) thereof, to the prejudice of Mr. Ximenes-Lopes' next of kin, alleged by the Commission and the representatives.

3. *Regarding to the claims for reparation*

74. The Court considers that the State has not acquiesced to any of the claims for reparation and legal costs made by the Commission and the representatives.

4. *Extension of the subsistent dispute*

75. Article 38(2) of the Rules of Procedure provide that

[I]n its answer, the respondent must state whether it accepts the facts and claims or whether it contradicts them, and the Court may consider accepted those facts that have not been expressly denied and the claims that have not been expressly contested.

76. At the above mentioned public hearing the State expressly stated that it does not acknowledge its international liability for the alleged violation of Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, to the prejudice of Mr. Damião Ximenes-Lopes' next of kin. In its closing written arguments, the State pointed out that it has neither violated the right to a fair trial nor the right to judicial protection, since it has complied with the principles of the due process of law, adversarial proceedings, and broad defense. According to the State, its commitment to justice was evidenced by the processing of the case in the domestic jurisdiction, as well as by the arguments submitted before the Court in the response to the petition, wherein a historical description was made of all measures adopted by the State for the purpose of finding the facts regarding the death of Mr. Damião Ximenes-Lopes and punish those responsible for the mistreatment and death suffered by said patient at the *Casa de Reposo de Guararapes* (Guararapes Rest Home).

77. Upon submitting its closing oral arguments at the above mentioned public hearing, the Commission stated that it reiterated the request made in the complaint filed before the Court that the State be condemned for the violation of Articles 8 and 25 of the Convention, regarding Article 1(1) thereof, since the State has not complied with the duties arising therefrom. Likewise, in its closing written arguments the Commission stated that all that has been done regarding the police investigation

and the criminal proceedings constitute a violation of the foregoing articles, to the prejudice of Mr. Ximenes-Lopes' next of kin.

78. For their part, in their closing arguments at the above mentioned public hearing the representatives requested the Court that Articles 8 and 25 of the Convention be found to have been violated to the prejudice of Mr. Damião Ximenes-Lopes and his next of kin. The representatives pointed out that over six years have passed since Mr. Damião Ximenes-Lopes died, but the legal proceedings instituted against those responsible for his death have not yet concluded, as a result of undue delays exclusively attributed to the State. Furthermore, in their closing argument the representatives requested the Court that the State be found to have violated Article 5 of the Convention to the prejudice of Mr. Damião Ximenes-Lopes' next of kin.

79. In accordance with the terms of the arguments submitted by the parties, the Court considers that the following issues continue to be in dispute:

- a) the alleged violation of the rights enshrined in Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the Convention, regarding Article 1(1) thereof, to the prejudice of Mr. Damião Ximenes-Lopes' next of kin, and in relation to the State's duty to conduct an effective investigation of the facts within a reasonable period in the light of the above mentioned articles;
- b) the alleged violation of the right enshrined in Article 5 (Right to Personal Integrity) of the Convention, regarding Article 1(1) thereof, to the prejudice of Mr. Damião Ximenes-Lopes' next of kin, and
- c) the issue regarding reparations and legal costs.

*

80. The Court considers that the State acquiescence is a positive contribution to the outcome of the instant case and to the effectiveness of the principles which have inspired the American Convention²² in Brazil.

81. Notwithstanding, taking into consideration the duty of the State to protect human rights and the nature of the instant case, the Court considers that rendering a judgment wherein the truth of the facts and the merits of the case, as well as the pertaining consequences thereof are determined, is a kind of reparation for Mr. Damião Ximenes-Lopes and his next of kin, and in turn, a contribution so that similar situations may be prevented from occurring again.²³

²² Cf. *Case of Baldeón-García*, *supra* note 4, para. 55; *Case of García-Asto and Ramírez-Rojas*, *supra* note 20, para. 60; and *Case of Gutiérrez-Soler*. Judgment of September 12, 2005. Series C No. 132, para. 59.

²³ Cf. *Case of Baldeón-García*, *supra* note 4, para. 56; and *Case of the Mapiripán Massacre*, *supra* note 21, para. 69.

b) *FOUNDATIONS FOR THE STATE'S DUTIES WITHIN THE FRAMEWORK OF THE STATE'S LIABILITY RESULTING FROM THE VIOLATION OF THE AMERICAN CONVENTION*

82. Once the scope of the partial acknowledgement of liability by the State has been established, the Court deems it necessary, in accordance with the facts set forth in the instant case, the evidence tendered, and the pleadings submitted by the parties, to determine the grounds for the State's duties within the framework of the State's liability resulting from the violations of the rights enshrined in the American Convention.

83. Within the scope of the foregoing Convention, the duties set forth in Articles 1(1) and 2 provide the grounds for determining the international liability of the State. Article 1(1) of the Convention places on the State Parties to the Convention the fundamental duties to respect and guarantee the rights, so that the impairment of the human rights recognized by the Convention which, pursuant to the international legal standards, may be attributed to the action or failure to act by any public official, is an act attributable to the State which entails its liability under the terms of the Convention. In turn, the general duty set forth in Article 2 of the American Convention implies the adoption of measures in two directions. On the one hand, the suppression of any rules and practices which entail the violation of the guarantees set forth in the Convention, and, on the other, the issuance of norms and the development of practices which aim at the effective compliance with such guarantees.²⁴

84. Any form of exercise of the State power which violates rights recognized by the Convention is unlawful. In this regard, under any circumstance in which a State body or official or a public institution unduly impairs one of such rights, either as the result of an act or failure to act,²⁵ there is an alleged non-compliance of the duty to respect the rights enshrined in Article 1(1) of the Convention.

85. The Court has further established that the State's liability may also result from acts committed by private individuals which, in principle, are not attributable to the State. The effects of the duties *erga omnes* of the States to respect and guarantee protection norms and to ensure the effectiveness of rights go beyond the relationship between their agents and the individuals under the jurisdiction thereof, since they are embodied in the positive duty of the State to adopt such measures as may be necessary to ensure the effective protection of human rights in inter-individual relationships.²⁶

86. The assumptions of the State's liability for the violation of rights enshrined in the Convention may include both the acts or the failure to act attributable to State bodies or officials, as well as the failure of the State to prevent third parties from

²⁴ Cf. *Case of Gómez-Palomino*, *supra* note 21, para. 91; *Case of the Mapiripán Massacre*, *supra* note 21, para. 109; and *Case of Lori Berenson-Mejía*. Judgment of November 25, 2004. Series C No. 119, para. 219.

²⁵ Cf. *Case of Baldeón-García*, *supra* note 4, para. 81; *Case of Pueblo Bello Massacre*. Judgment of January 31, 2006. Series C No. 140, paras. 111 and 112; and *Case of the Mapiripán Massacre*, *supra* note 21, para. 110.

²⁶ Cf. *Case of Pueblo Bello Massacre*, *supra* note 25, para. 113; *Case of the Mapiripán Massacre*, *supra* note 21, para. 111; and *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 140.

impairing the juridical rights protected by human rights. Notwithstanding, between these two extremes of liability is the conduct described in the Resolution of the International Law Commission,²⁷ of a person or entity which, though not a state body, is authorized by the State legislation to exercise powers entailing the authority of the State. Such conduct, either by a natural or legal person, must be deemed to be an act by the State, inasmuch as such person acted in such capacity.

87. Hence, the acts performed by any entity, either public or private, which is empowered to act in a State capacity, may be deemed to be acts for which the State is directly liable, as it happens when services are rendered on behalf of the State.

88. The Court has further established that from the general duties to respect and guarantee the rights, special duties are derived which are to be determined according to the specific needs of protection of the legal person, either due to his personal condition or the specific situation he is in.²⁸

89. As to the persons who are under medical treatment, and since health is a public interest the protection of which is a duty of the States, these must prevent third parties from unduly interfering with the enjoyment of the rights to life and personal integrity, which are particularly vulnerable when a person is undergoing health treatment. The Court considers that the States must regulate and supervise all activities related to the health care given to the individuals under the jurisdiction thereof, as a special duty to protect life and personal integrity, regardless of the public or private nature of the entity giving such health care.

90. The failure to regulate and supervise such activities gives rise to international liability, as the States are liable for the acts performed by both public and private entities which give medical assistance, since under the American Convention international liability comprises the acts performed by private entities acting in a State capacity, as well as the acts committed by third parties when the State fails to fulfill its duty to regulate and supervise them. Therefore, the duty of the States to regulate these acts is not limited to public hospitals, but includes any and all health care institutions.

*

91. Under the State coverage, “[h]ealth is a right due to everyone and the State’s duty, which is guaranteed through social and economic policies which have the purpose of reducing health risks and guaranteeing the universal and egalitarian access to health programs and services aimed at ensuring health promotion, protection, and recovery,” as provided for by Article 196 of its Constitution. Furthermore, in accordance with Article 197 thereof, it is “the responsibility of the Power of the State, according to law, to provide for the regulation, supervision and control of such health programs and services [,··· and their] implementation must be carried out either directly or through third parties, and by private natural or artificial persons.”

²⁷ Cf. Liability of the State for internationally unlawful acts. International Law Commission 53rd session, 2001. UN Document A/56/10. Text introduced in the appendix to UN General Assembly Resolution 56/83 of January 28, 2002.

²⁸ Cf. *Case of Baldeón-García*, *supra* note 4, para. 81; *Case of the Sawhoyamaya Indigenous Community*, *supra* note 4, para. 154; and *Case of Pueblo Bello Massacre*, *supra* note 25, para. 111.

92. Article 199 of the Constitution provides that “[h]ealth care is open to the private initiative,” meaning that private institutions can render health care services, which will be fully paid by users. Notwithstanding, the first paragraph of such Article 199 provides that “[p]rivate institutions, among which philanthropic and non-profit organizations will be given priority, may participate in the [S]ingle [H]ealth [S]ystem by rendering health care services as supplementary agents, in accordance with the guidelines laid down by such System and by virtue of a public contract or agreement.” Private institutions may also render services for the public health system, in which case health care will be financed by the State and will be of a public nature.

93. Law No. 8,080 of September 19, 1990 “regulates nationwide health policies, programs, and services provided either independently or jointly, permanently or fortuitously, by public or private natural or artificial persons.” Article 4 of said law defines Brazil’s Single Health System (SUS) as the “set of health policies, programs, and services provided by federal, state* or municipal bodies, as well as by institutions which are directly or indirectly managed by the State and by foundations thereby supported,” and reaffirms the above mentioned constitutional provision when establishing that “[p]rivate institutions may participate in Brazil’s Single Health System as supplementary agents.”

94. From the foregoing it results that in the State system, health care services may be rendered by public bodies or private institutions; in the latter case, the services are private and paid by the patients themselves, but the State keeps its power to supervise them.

95. When health care services are public, it is the State which renders them directly to the population, through its Single Health System. This public health care system is primarily offered at public hospitals; notwithstanding when in a region of the country there are not enough public hospitals to provide health care services to all patients,²⁹ private institutions, as supplementary agents and by virtue of contracts or agreements entered into with the SUS, may also provide health care under the umbrella of the Single Health System. In both cases, whether the patient is admitted into a public hospital or a private institution which operates by virtue of a contract or an agreement entered into with the SUS, the patient is under the care of the Brazilian public health system, that is, of the State.

96. Rendering public services implies the protection of public interests, which is one of the objectives of the State. Though the States may delegate the rendering of such services, through the so-called outsourcing, they continue being responsible for providing such public services and for protecting the public interest concerned. Delegating the performance of such services to private institutions requires as an essential element the responsibility of the States to supervise their performance in order to guarantee the effective protection of the human rights of the individuals under the jurisdiction thereof and the rendering of such services to the population on the basis of non-discrimination and as effectively as possible.

* The term “state” refers to the “states” as the political units making up the Brazilian federation.

²⁹ Cf. Article 24 of Law No. 8.080/1990.

97. The States have the duty to respect the rights recognized in the Convention and to organize their power so as to guarantee the free and full exercise of human rights to the individuals under the jurisdiction thereof,³⁰ such duty encompassing all government levels, as well as other institutions to which the States delegate their authority.

98. Pursuant to Article 2 of the Convention, the States must create an appropriate legal framework to establish the standards of treatment and hospitalization to be complied with by health care institutions. The States must establish and adopt in their respective legal systems all such measures as may be necessary so that the provisions of the Convention may be met and enforced,³¹ and legislation does not become a mere formality drifted apart from reality.

99. In view of the foregoing, the Court considers that the States are responsible for regulating and supervising at all times the rendering of services and the implementation of the national programs regarding the performance of public quality health care services so that they may deter any threat to the right to life and the physical integrity of the individuals undergoing medical treatment. They must, *inter alia*, create the proper mechanisms to carry out inspections at psychiatric institutions, submit, investigate, and solve complaints and take the appropriate disciplinary or judicial actions regarding cases of professional misconduct or the violation of the patients' rights.³²

100. In the instant case, the *Casa de Reposo Guararapes* (Guararapes Rest Home), where Damião Ximenes-Lopes died, was a private health institution engaged by the State to render mental health services under the coverage of Brazil's Single Health System and operating as a public health institution on behalf of the State (*infra* para. 112(55)). Therefore, the State is liable for the conduct of the staff of the *Casa de Reposo Guararapes*, which exercised the state authority in rendering public health services under Brazil's Single Health System.

c) *THE SPECIAL CARE DUE TO PERSONS WITH MENTAL DISABILITIES BY REASON OF THEIR SPECIAL VULNERABILITY*

101. To the purposes of the instant case, the alleged victim of which, Mr. Damião Ximenes-Lopes, was mentally ill and died while he was under treatment in a mental health institution, the Court must go on record to emphasize the special attention the States must give to the persons with mental disabilities for they are particularly vulnerable.

102. In this regard, the European Court has stated that,

"Regarding to persons in need of psychiatric treatment in particular, the Court observes that the State is under an obligation to secure to its citizens their right to physical integrity under Article 8 of the

³⁰ Cf. *Case of the Sawhoyamaxa Indigenous Community*, *supra* note 4, para. 142; *Case of the Indigenous Community Yakye Axa*. Judgment of June 17, 2005. Series C No. 125, para. 153; and *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, para. 142.

³¹ Cf. *Case of the Sawhoyamaxa Indigenous Community*, *supra* note 4, para. 110; *Case of Gómez-Palomino*, *supra* note 21, paras. 90 and 91; and *Case of Palamara Iribarne*. Judgment of November 22, 2005. Series C No. 135, para. 89.

³² Cf. Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, UN General Assembly Resolution 46/119.46, p.189, UN Document A/46/49 (1991), principle 22.

*Convention. For this purpose there are hospitals run by the State which coexist with private hospitals. The State cannot completely absolve itself of its responsibility by delegating its obligations in this sphere to private bodies or individuals. [...] The Court finds that, similarly, in the present case the State remained under a duty to exercise supervision and control over private psychiatric institutions. Such institutions, [...] need not only a license, but also competent supervision on a regular basis of whether the confinement and medical treatment is justified.*³³

103. The Inter-American Court considers that any person who is in a vulnerable condition is entitled to special protection, which must be provided by the States if they are to comply with their general duties to respect and guarantee human rights. The Court reaffirms that not only should the States refrain from violating such rights, but also adopt positive measures, to be determined according to the specific needs of protection of the legal person, either because of his personal condition or the specific situation he is in,³⁴ such as his disabilities.

104. In this regard, the States should take into consideration that the groups of persons who live in adverse conditions and have few resources, such as those who live in extreme poverty, children and teenagers who are at risk, and indigenous communities, are at a higher risk to suffer from mental disabilities, as was the case of Mr. Damião Ximenes-Lopes. The link between the disability, on the one hand, and poverty and social exclusion, on the other, is direct and significant. In view of the foregoing, among the positive measures to be adopted by the States are those which are necessary to prevent all types of disabilities which may be prevented, and to give the persons with mental disabilities the preferential treatment which is most suitable to their condition.³⁵

105. Persons with disabilities are often discriminated by reason of their condition, whereby the States must take legislative, social, educational, occupational, and any other type of action as may be necessary as to prevent all types of discrimination associated with mental disabilities, and to promote the full integration of such persons in society.³⁶

106. Regarding the safeguard of life and personal integrity, it is necessary to consider that the persons with disabilities, who live in psychiatric institutions or are undergoing treatment therein, are particularly vulnerable to torture and other types of cruel, inhuman or degrading treatment. The vulnerability inherent to people with mental disabilities is compounded by the high degree of intimacy which is typical of the treatment of psychiatric illnesses, which makes these persons more susceptible to mistreatment when they are hospitalized (*infra* para. 129).

107. In the context of health care institutions, whether they are public or private centers, the staff in charge of the care of patients exercise a strong control or

³³ Cf. European Court of Human Rights, *Case of Storck v. Germany*, Application No. 61603/00, judgment of June 16, 2005, p. 103.

³⁴ Cf. *Case of Baldeón-García*, *supra* note 4, para. 81; *Case of the Sawhoyamaya Indigenous Community*, *supra* note 4, para. 154; and *Case of Pueblo Bello Massacre*, *supra* note 25, para. 111.

³⁵ Cf. Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, approved in Guatemala City, Guatemala, on June 7, 1999, Article III (2); and Committee on Economic, Social, and Cultural Rights, General Comment No. 5, "Persons with Disabilities." UN Document E/1995/22 (1994), para. 9.

³⁶ Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, *supra* note 35, Preamble and Article III (1).

dominance over the persons who are under their custody. This intrinsic imbalance in power between hospitalized patients and the persons having authority over them is usually greater in psychiatric institutions. Torture and other forms of cruel, inhuman, or degrading treatment, when inflicted on these people, affect their psychic, physical, and moral integrity, entail an insult to their dignity, and seriously restrict their autonomy, which could aggravate their condition.

108. All the foregoing circumstances require the strict supervision of such institutions. The States have the duty to supervise and guarantee that in all psychiatric institutions, either public or private, the patients' right to receive a worthy, human, and professional treatment be preserved and that said patients be protected against exploitation, abuse, and degradation.

109. Mental health care should be available to every person who needs it. Any treatment of persons with mental disabilities should serve the patient best interest, aim at preserving his dignity and autonomy, reducing the impact of his illness, and improving his life quality³⁷ (*infra* paras. 135, 138, and 139).

110. Upon examining the violations to life and personal integrity to the prejudice of Mr. Damião Ximenes-Lopes, the Court shall refer to the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, an instrument which is part of the legal framework designed to the protection of human rights in the Inter-American system, which was ratified by the State on August 15, 2001, as a source of interpretation to determine the duties of the State regarding the American Convention in the instant case.

111. Furthermore, the main standards applicable to mental health treatment have been established within the scope of the World Health Organization and of the Pan-American Health Organization. The Court considers that such instruments as the UN Principles for the Treatment of People with Mental Health Disabilities and the Improvement of Health Care and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, approved by UN General Assembly Resolution No. 48/96 of December 20, 1993, as well as the technical standards provided for in the Caracas and the Madrid Declarations are of particular importance for the analysis and careful examination of the compliance of the treatment given to Mr. Damião Ximenes-Lopes with the existing international standards in this field. The Court shall give special consideration to such instruments upon examining the violation of Articles 4 and 5 of the American Convention in the instant case.

VII PROVEN FACTS

112. Having examined the body of evidence in the record of this case, the statements by the parties, as well as the partial acknowledgment of international liability by the State, the Court finds the following facts to be proven. This chapter

³⁷ Cf. World Health Organization. Division of Mental Health and Prevention of Substance Abuse. Ten Basic Principles of Mental Health Care Law (1996), principles 2, 4, and 5.

contains the facts that this Court finds to be proven, on the basis of the State's partial acknowledgment of liability, and that relate to the facts included in the application filed by the Inter-American Commission. In addition, the Court has found other facts to be proven, in particular, those related to the police investigation and the court proceedings, in accordance with the evidence furnished by the Commission, the representatives, and the State.

A) *Medical record of Mr. Damião Ximenes-Lopes*

112(1) Mr. Damião Ximenes-Lopes, son of Mrs. Albertina Viana-Lopes and Mr. Francisco Leopoldino Lopes, was born on June 25, 1969. Irene Ximenes-Lopes-Miranda and Cosme Ximenes-Lopes are two of his siblings. Mr. Damião Ximenes-Lopes was a creative young man, who loved music and the fine arts and wanted to achieve a better financial position.³⁸

112(2) During his youth, Mr. Damião Ximenes-Lopes, developed a mental illness of organic etiology, caused by brain dysfunction. Sporadically, Mr. Ximenes-Lopes experienced difficulties and had specific needs related to his condition. At the time of the events giving rise to this case, Mr. Damião Ximenes-Lopes was 30 years old and lived with his mother in the city of Varjota, located approximately one hour from the city of Sobral, seat of *Casa de Reposo Guararapes* (Guararapes Rest Home).

112(3) In 1995, Mr. Damião Ximenes-Lopes was admitted, for the first time, to *Casa de Reposo Guararapes* for two months. Although he was better when he returned home, he had injuries to his knees and ankles, which Mr. Ximenes-Lopes justified by claiming he had been a victim of violence. His relatives believed the version of an officer of *Casa de Reposo Guararapes*, who asserted, when inquired about the cause of the injuries, that they were self-inflicted while Mr. Ximenes-Lopes was trying to escape.

112(4) A few days before October 1, 1999, Mr. Damião Ximenes-Lopes suffered "anxiety, he would not eat or sleep, [he had to take medication], but he was not taking it at the time." On Friday, October 1, Mrs. Albertina Viana-Lopes decided to take her son to *Casa de Reposo Guararapes* (Guararapes Rest Home). While waiting to be admitted, the alleged victim asked his mother "in a calm voice [...] whether he was to stay there or go back home with her."

112(5) Mr. Damião Ximenes-Lopes was admitted to *Casa de Reposo Guararapes* (Guararapes Rest Home) as a patient of the *Sistema Único de Salud* (SUS) (Single Health System), in excellent physical condition, on October 1999. He showed no signs of aggression or external injuries.

112(6) In Mr. Damião Ximenes-Lopes' medical record kept in *Casa de Reposo Guararapes* (Guararapes Rest Home) of October 2, 1999, there is only one note,

³⁸ Cf. Damião Ximenes-Lopes' s birth certificate (record of appendixes to the application, appendix 21, page 160); statement made by Irene Ximenes-Lopes-Miranda during the public hearing held before the Inter-American Court on November 30, 2005; and report prepared by psychiatrist Lidia Días Costa, at the request of Irene Ximenes-Lopes-Miranda, submitted on December 14, 2002 (record of appendixes to the application, appendix 22, pages 161 to 164). As regards to Mr. Cosme Ximenes-Lopes, in the briefs filed by the parties he is referred to, without distinction, as Cosme or Cosmo Ximenes-Lopes This Court considers that it is the same person; therefore, in this Judgment he will be referred to as Cosme Ximenes-Lopes.

indicating that the patient was “calm, disoriented, [...] confused.” No medication was prescribed that day.³⁹

112(7) On October 3, 1999, Mr. Damião Ximenes-Lopes had an aggressive crisis and was disoriented. The alleged victim got into one of the bathrooms of *Casa de Reposo Guararapes* (Guararapes Rest Home) and refused to come out until he was overpowered and forced out by a nurse’s aide, Mr. Elías Coimbra, together with two other patients, who, according to the nurse’s aide, could help take Mr. Ximenes-Lopes out of the bathroom because they were “oriented and [...] had a rather robust physical presence.” When he was being overpowered by one of the patients and forced out of the bathroom, the alleged victim suffered an injury to his face, in the eyebrow region. Mr. Damião Ximenes-Lopes was immediately subjected to physical restraint and the physician who was at *Casa de Reposo Guararapes* at the time decided to administer “intramuscular *fernagan* [and] *haldol*” to the patient.⁴⁰

112(8) In the evening of the same day, the alleged victim had another aggressive episode and was once again placed under physical restraint, to which he was subjected from Sunday night to Monday morning.⁴¹

B) Maltreatment and death of Mr. Damião Ximenes-Lopes

112(9) On October 4, 1999, approximately at 9.00 am, the mother of Mr. Damião Ximenes-Lopes went to visit his son at *Casa de Reposo Guararapes* (Guararapes Rest Home) and found him bleeding, with bruises, his clothes torn, dirty and smelling like excrement, with his hands tied backwards, having difficulty breathing, agonizing and shouting and calling out to the police for help. Mr. Ximenes-Lopes was still under physical restraint, which had been applied the night before. He already had excoriations and injuries and was allowed to walk without proper supervision. Later, a nurse’s aide laid him on a bed, from which he fell. So he was laid on a mat on the floor.⁴²

112(10) Albertina Ximenes-Lopes requested the employees of *Casa de Reposo Guararapes* (Guararapes Rest Home) to bathe him and looked for a doctor to examine and treat her son. She found Francisco Ivo de Vasconcelos, clinical director and doctor of *Casa de Reposo Guararapes*, who, without performing any physical examination of Mr. Damião Ximenes-Lopes, prescribed some medications and then left the hospital. No doctor remained in charge of the institution at the time.⁴³

³⁹ Cf. medical progress report of patient Damião Ximenes-Lopes (record of appendixes to the answer to the application, appendix I, volume I, page 1736).

⁴⁰ Cf. statement made by Elias Gomes-Coimbra before the *Comisaría Regional de Sobral* (Sobral Regional Police Station) on November 26, 1999 (record of appendixes to the application, appendix 29, pages 179 to 180).

⁴¹ Cf. statement made by Carlos Alberto Rodrigues-dos Santos before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on April 24, 2000 (record of appendixes to the application, appendix 12, pages 108 to 110).

⁴² Cf. statement made by Carlos Alberto Rodrigues-dos Santos before *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on April 24, 2000, *supra* note 41; statement made by André Tavares-do Nascimento before the *Comisaría Regional de Sobral* (Sobral Regional Police Station) on November 26, 1999 (record of appendixes to the application, appendix 29, page 180); and statement made by Albertina Viana-Lopes before the *Comisaría Regional de Sobral* (Sobral Regional Police Station) on December 7, 1999 (record of appendixes to the application, appendix 32, pages 213 and 214).

⁴³ Cf. statement made by Francisco Ivo de Vasconcelos before the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social Coordinadora Municipal de*

112(11) Mr. Damião Ximenes-Lopes died a violent death on October 4, 1999 at 11.30 am, at *Casa de Reposo Guararapes* (Guararapes Rest Home), approximately two hours after being medicated by the clinical director of the hospital, and without any physician to provide medical care at the time of his death as, at the time, there was no doctor present in the public health care unit in which he had been admitted to receive psychiatric care. No adequate medical attention was provided to Mr. Damião Ximenes-Lopes and, as a result of this lack of care, the patient was at the mercy of all kinds of life-threatening accidents and aggression.⁴⁴

112(12) After the death of Mr. Damião Ximenes-Lopes, Doctor Francisco Ivo de Vasconcelos was called to *Casa de Reposo Guararapes* (Guararapes Rest Home). He examined the body of the alleged victim, declared him dead and included in the record that the body did not show any external injuries and that the cause of death had been a "cardio respiratory arrest."⁴⁵ The doctor did not order an autopsy of the body of Mr. Damião Ximenes-Lopes. Mrs. Albertina Viana-Lopes learned of her son's death when she arrived home, located in the Municipality of Varjota.

112(13) On the same day of his death, the next of kin of Mr. Damião Ximenes-Lopes requested an autopsy, and his body was transferred from the city of Sobral to the city of Fortaleza, where the autopsy was to be performed. During the journey, the body bled profusely and when they arrived at their destination the sheet covering the body was soaked in blood.

112(14) On October 4, 1999, the autopsy on the body of Mr. Damião Ximenes-Lopes was performed at the *Instituto Médico Legal Dr. Walter Porto* (Dr. Walter Porto Medico-Legal Institute), where Francisco Ivo de Vasconcelos also worked as a doctor. The autopsy report contained the following findings:

At 10.40 pm of [October] 4, 1999, a male body was brought into the morgue of the [Medico-Legal Institute], accompanied by police report No. 796/99 issued by the *Comisaría Regional de Sobral* (Sobral Regional Police Station) - [Ceará], stating that "he was

Control, Evaluación y Auditoría Coordinadora Municipal de Control, Evaluación y Auditoría Coordinadora Municipal de Control, Evaluación y Auditoría (Control, Evaluation and Audit Municipal Coordinator) on November 5, 1999 (record of appendixes to the application, appendix 14, pages 112 and 113), statement made by Albertina Viana-Lopes before the *Comisaría Regional de Sobral* (Sobral Regional Police Station) on December 7, 1999, *supra* note 42; and report on the Administrative Investigation prepared at the request of the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social* (Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau), issued on February 18, 2000 (record of appendixes to the application, appendix 31, pages 185 to 212).

⁴⁴ Cf. statement made by Francisco Ivo de Vasconcelos before the *Coordinadora Municipal de Control, Evaluación y Auditoría* (Control, Evaluation and Audit Municipal Coordinator) on November 5, 1999, *supra* note 43; statement made by María Salete Morais-Melo de Mesquita before the *Coordinadora Municipal de Control, Evaluación y Auditoría* (Control, Evaluation and Audit Municipal Coordinator) on November 5, 1999 (record of appendixes to the application, appendix 14, pages 113 and 114); report on the Administrative Investigation prepared at the request of the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social* (Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau), issued on February 18, 2000, *supra* note 43; and report of the *corpus delicti* examination - post-mortem- conducted on Damião Ximenes-Lopes at the *Instituto Médico Legal Dr. Walter Porto* (Dr. Walter Porto Medico-Legal Institute) on October 4, 1999 (record of appendixes to the application, appendix 41, page 246).

⁴⁵ Cf. statement made by Francisco Ivo de Vasconcelos before the *Coordinadora Municipal de Control, Evaluación y Auditoría* (Control, Evaluation and Audit Municipal Coordinator) on November 5, 1999, *supra* note 43.

admitted to Guararapes hospital for persons with mental illness 3 days ago and this morning his mother went to visit him [and found him] having a nervous breakdown, with his nose bleeding and signs of physical abuse. He died today at 11.30 am in said hospital in Sobral - [Ceará].” It is a dun-colored male body with dark hair, thick mustache, and shaved beard, wrapped in a white sheet. It exhibits generalized rigor mortis, dilated pupils, hypostasis on the back and no vital signs. External Examination: excoriations in the area of the nose, right shoulder, anterior aspect of knees and left foot, ecchymosis around left eye, homolateral shoulder and fists (consistent with restraint).” Internal Examination: no signs of internal traumatic injuries; pulmonary edema and congestion are present, with no other macroscopic alterations of medico-legal interest in all other organs in those cavities. Samples of lung, heart, stomach, liver, and kidney were sent for histopathologic examination. Results revealed mild pulmonary congestion and pulmonary edema, pulmonary hemorrhage and mild-to-moderate liver steatosis. CONCLUSION: [···] we infer that it is a death of unknown cause.

Answers to the following questions:

- 1- [FIRST - Was there death?]; yes.
- 2-[SECOND - What was the cause of death?]; unknown.
- 3-[THIRD - What was the instrument or means employed that caused the death?]; no evidence to answer the question.
- 4-[FOURTH - Was it caused by poison, fire, explosion, asphyxia or torture or any other insidious or cruel means?]; no evidence to answer the question.

Without further ado, the person in charge was ordered to complete the report, which, after being read and approved, was duly signed.⁴⁶

112(15) Subsequently, on February 17, 2000, in response to a request from the Attorney General’ s Office for the physicians who performed the autopsy to “determ[ine] whether the injuries [found on the body] m[ay] have been the result of bumps or falls suffered [by Mr. Damião Ximenes-Lopes],” the Medico-Legal Institute elaborated on its conclusions and informed that “the injuries described [in the post-mortem examination report] were caused by a blunt instrument (or by multiple bumps or falls) and that it was impossible to identify the precise manner in which they were caused.”⁴⁷

112(16) In 2002, the *Quinta Sala Civil del Juzgado de Sobral* (Fifth Civil Chamber of the Trial Court in and for Sobral) (hereinafter, “the Fifth Civil Chamber”), during the civil proceedings relating to the death of Mr. Damião Ximenes-Lopes, ordered that the body of the alleged victim be exhumed in order to establish the cause of his death (*infra* paras. 112(52) and 112(54)). The exhumation was carried out on April 6, 2002 by the *Instituto Médico Legal Dr. Walter Porto* (Dr. Walter Porto Medico-Legal Institute). The post-exhumation examination report contained the following description:

We exhumed and autopsied the body of Mr. Damião Ximenes-Lopes at 10.10 am of [April] 6, 2002 at São Raimundo Cemetery in the Municipality of Varjota - Ceará, at the request of judge Maria Valdenisa de Sousa Bernardo in and for Sobral, pursuant to official letter No. 372/2001[. ···] After having identified the place where the victim was inhumed, the vault was opened, where we observed a wooden coffin in bad condition, which contained the remains of the victim in an advanced state of decomposition; i.e. we only found the

⁴⁶ Cf. report of the *corpus delicti* examination - post-mortem- conducted on Damião Ximenes-Lopes at the *Instituto Médico Legal Dr. Walter Porto* (Dr. Walter Porto Medico-Legal Institute) on October 4, 1999, *supra* note 44.

⁴⁷ Cf. official letter No.173/2000 from the *Instituto Médico Legal Dr. Walter Porto* (Dr. Walter Porto Medico-Legal Institute), dated February 17, 2000 (record of appendixes to the application, appendix 44, page 251).

bones of the body. A thorough expert examination of each bone of the skull showed that a transversal craniotomy had been performed (result of the previous expert examination) and no fractures were found in that body component, i.e. the skull showed integrity of all its bones. All other bones of the body showed no fractures either. Conclusion: based on the foregoing and in the absence of any further necroscopic findings as a result of the advanced state of decomposition of the body, we conclude that it was a death of unknown cause.

Answers to the following questions:

1- [FIRST - Was there death?]; yes.

2-[SECOND - What was the cause of death?]; unknown.

3-[THIRD - What was the instrument or means employed that caused the death?]; no evidence to answer the question.

4-[FOURTH - Was it caused by poison, fire, explosion, asphyxia or torture or any other insidious or cruel means?]; no evidence to answer the question.

Without further ado, the person in charge was ordered to complete the report, which, after being read and approved, was duly signed.⁴⁸

C) *Police investigation about the death of Mr. Damião Ximenes-Lopes*

112(17) On October 13, 1999, Mrs. Albertina Viana-Lopes filed a complaint with the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social* (Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau) regarding the death of her son, Mr. Damião Ximenes-Lopes. In October, 1999, Mrs. Irene Ximenes-Lopes-Miranda, sister of Mr. Ximenes-Lopes, filed a complaint with the *Comisión de Ciudadanía y Derechos Humanos de la Asamblea Legislativa del estado del Ceará* (Civil and Human Rights Commission of the Legislative Assembly of the state of Ceará), pleading for justice and the punishment of those responsible for the death of his brother.⁴⁹

112(18) On November 8, 1999, Attorney General's Office Prosecutor Alexandre de Oliveira-Alcântara requested a police investigation about the death of Mr. Damião Ximenes-Lopes, which occurred on October 4, 1999 at *Casa de Reposo Guararapes* (Guararapes rest Home). On November 9, 1999, 36 days after the death of Mr. Damião Ximenes-Lopes, the Police Station for the Seventh Region of Sobral, by means of Administrative Resolution No. 172/99, ordered an investigation about the death of Mr. Damião Ximenes-Lopes.⁵⁰

⁴⁸ Cf. autopsy report (post-exhumation) issued by the *Instituto Médico Legal Dr. Walter Porto* (Dr. Walter Porto Medico-Legal Institute) on April 6, 2002 (record of appendixes to the answer to the application, appendix II, page 2549).

⁴⁹ Cf. complaint filed by Albertina Viana-Lopes with the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social* (Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau) on October 13, 1999 (record of appendixes to the application, appendix 25, pages 174 and 175); and report on the Administrative Investigation prepared at the request of the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social* (Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau), issued on February 18, 2000, *supra* note 43.

⁵⁰ Cf. brief filed by the Attorney General's Office Prosecutor with the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on November 8, 1999 (record of appendixes to the answer to the application, appendix I, volume I, page 1537); and order of the Sobral Police Chief, issued on November 9, 1999 (record of appendixes to the answer to the application, appendix I, volume I, pages 1535 and 1536).

112(19) On November 11, 1999, the *Comisión de Derechos Humanos y Ciudadanía de la Asamblea Legislativa del estado del Ceará* (Civil and Human Rights Commission of the Legislative Assembly of the state of Ceará) sent a brief to the Sobral Police Chief, requesting the expeditious handling of the case of Mr. Damião Ximenes-Lopes in order to secure punishment of those responsible for his death.⁵¹

112(20) On November 26, 1999, Antônio Vitorino de Sousa-Rufino, Elias Gomes-Coimbra, André Tavares-do Nascimento, Carlos Alberto Rodrigues-dos Santos, Maria Verónica Miranda-Bezerra, Francisco Alexandro Paiva-Mesquita and Sérgio Antunes - Ferreira-Gomes' s statements were taken at the *Comisaría Regional de Sobral* (Sobral Regional Police Station).⁵²

112.21. The statements of Francisco Ivo de Vasconcelos, Marcelo Messias-Barros, Maria Salete Morais-Melo de Mesquita, Albertina Viana-Lopes, Antônio Airton-Miranda, Irene Ximenes-Lopes-Miranda, João Alves-da Silva, Francisco das Chagas-Melo, Mairton Paiva-de Oliveira, Sebastião Vieira-Filho, Francisco Magalhães-de Aquino, Maria Cladenice Silva-Porfirio, Maria Gorete-Marques, André Tavares-do Nascimento, Carlos Alberto Rodrigues-dos Santos, José Elieser Silva-Procópio, Francisco Raimundo-Alves and Evaldo Castilho-Aragão-Oliveira were taken at the *Comisaría Regional de Sobral* (Sobral Regional Police Station) on December 3, 4, 7, 9, 15, 16 and 20, 1999.⁵³

112(22) On December 8, 1999, the Chief of Police for the Seventh Region of Sobral, sent his Final Report regarding complaint No. 404/99 to the Attorney General's Office, in which he indicated that there was "probable liability [of *Casa de Reposo Guararapes* (Guararapes Rest Home)] and of the persons involved in the

⁵¹ Cf. brief of the *Asamblea Legislativa del estado del Ceará* (Legislative Assembly of the state of Ceará) addressed to the Sobral Police Chief, dated November 11, 1999 (record of appendixes to the answer to the application, appendix I, volume I, pages 1544 to 1546).

⁵² Cf. statements made by Antônio Vitorino de Sousa-Rufino, Elias Gomes-Coimbra, André Tavares-do Nascimento, Carlos Alberto Rodrigues-dos Santos, Maria Verónica Miranda-Bezerra, Francisco Alexandro Paiva-Mesquita and Sergio Antunes-Ferreira Gomes at the *Comisaría Regional de Sobral* (Sobral Regional Police Station) on November 26, 1999 (record of appendixes to the answer to the application, appendix I, volume I, pages 1540 to 1543).

⁵³ Cf. statement made by Francisco Ivo de Vasconcelos at the *Comisaría Regional de Sobral* (Sobral Regional Police Station) on December 3, 1999 (record of appendixes to the answer to the application, appendix I, volume I, pages 1572 to 1574); statements made by Marcelo Messias-Barros and Maria Salete-Morais-Melo de Mesquita at Sobral Regional Police Station on December 4, 1999 (record of appendixes to the answer to the application, appendix I, volume I, pages 1577 to 1580); statements made by Albertina Viana-Lopes, Antônio Airton-Miranda and Irene Ximenes-Lopes-Miranda at Sobral Regional Police Station on December 7, 1999 (record of appendixes to the answer to the application, appendix I, volume I, pages 1582 to 1586); statements made by João Alves-da Silva, Francisco das Chagas-Melo, Mairton Paiva-de Oliveira and Sebastião Vieira-Filho at Sobral Regional Police Station on December 9, 1999 (record of appendixes to the answer to the application, appendix I, volume I, pages 1671 to 1680); statements made by Francisco Magalhães de Aquino, Maria Cladenice Silva Porfirio and Maria Gorete Marques at Sobral Regional Police Station on December 15, 1999 (record of appendixes to the answer to the application, appendix I, volume I, pages 1599 to 1601 and 1608); statements made by André Tavares-do Nascimento, Carlos Alberto Rodrigues-dos Santos and José Elieser-Silva-Procópio at Sobral Regional Police Station on December 16, 1999 (record of appendixes to the answer to the application, appendix I, volume I, pages 1609 to 1611); and statements made by Francisco Raimundo Alves and Evaldo Castilho-Aragão-Oliveira at Sobral Regional Police Station on December 20, 1999 (record of appendixes to the answer to the application, appendix I, volume I, pages 1618 and 1619).

maltreatment, torture, and homicide reported by the family of inpatient Damião Ximenes-Lopes.”⁵⁴

112(23) On February 8, 11 and 15, 2000, confrontation of witnesses Sebastião Alves-Costa-Filho, André Tavares-do Nascimento, Francisco Ivo de Vasconcelos and Albertina Viana-Lopesse was conducted and the statements of Sebastião Alves-Costa-Filho, Cândida Martins-Vieira, João Paulo Melo, Maria Gorete-Silva and Maria Expedita Sousa-Lira were taken at the *Comisaría Regional de Sobral* (Sobral Regional Police Station).⁵⁵

112(24) On February 25, 2000, the *Comisaría Regional de Sobral* (Sobral Regional Police Station) forwarded the record of the investigation conducted concerning complaint No. 404/99 to the Incumbent Judge in and for Sobral.⁵⁶

D) *Criminal Proceedings concerning maltreatment and death of Mr. Damião Ximenes-Lopes*

112(25) On March 27, 2000, the representative of the Attorney General’s Office filed a formal accusation with the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) against Sérgio Antunes-Ferreira-Gomes, Carlos Alberto Rodrigues-dos Santos, André Tavares-do Nascimento and Maria Salete - Moraes-de Mesquita, for their alleged involvement in the crime of maltreatment resulting in death, as defined in the Brazilian Penal Code, Section 136, paragraph 2, to the detriment of Mr. Damião Ximenes-Lopes.⁵⁷

112(26) On April 10, 2000, the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) ordered defendants to appear in court for questioning, under penalty of being found in default. On April 24, 2000, defendants Maria Salete-Moraes Melo de Mesquita, Sérgio Antunes-Ferreira-Gomes and Carlos Alberto Rodrigues-dos Santos testified before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) and Mr. André Tavares-do Nascimento testified on April 26, 2000.⁵⁸

⁵⁴ Cf. Final Report issued by the *Comisaría Regional de Sobral* (Sobral Regional Police Station) on December 8, 1999 regarding case No. 404/99 (record of appendixes to the answer to the application, appendix I, volume I, page 1588 to 1593).

⁵⁵ Cf. record of confrontation of witnesses conducted at the *Comisaría Regional de Sobral* (Sobral Regional Police Station) on February 8, 2000 (record of appendixes to the answer to the application, appendix I, volume I, pages 1694 to 1695); statement made by Sebastião Alves Costa Filho at Sobral Regional Police Station on February 8, 2000 (record of appendixes to the answer to the application, appendix I, volume I, pages 1692 to 1693); statements made by Cândida Martins-Vieira and João Paulo Melo at Sobral Regional Police Station on January 11, 2000 (record of appendixes to the answer to the application, appendix I, volume I, pages 1766 and 1767); and statements made by Maria Gorete-Silva and Maria Expedita Sousa-Lira at Sobral Regional Police Station on February 15, 2000 (record of appendixes to the answer to the application, appendix I, volumes I and II, pages 1789 to 1795).

⁵⁶ Cf. official letter No.365/2000 issued by Sobral Chief of Police on February 25, 2000, addressed to the Incumbent Judge in and for Sobral (record of appendixes to the answer to the application, appendix I, volume I, page 1416).-o}

⁵⁷ Cf. brief filed by the Attorney General’s Office Prosecutor with the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on March 27, 1999 (record of appendixes to the answer to the application, appendix I, volume I, pages 1409 to 1414).

⁵⁸ Cf. order for summons issued by the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on April 10, 2000 (record of appendixes to the answer to the application, appendix I, volume II, page 1842); statements made by Maria Salete Moraes Melo de Mesquita, Sérgio

112(27) On April 27 and May 17 and 24, 2000, defendants Maria Salete Moraes-Melo de Mesquita, Sérgio Antunes-Ferreira-Gomes, André Tavares-do Nascimento, and Carlos Alberto Rodrigues-dos Santos filed an answer to the accusation of the Attorney General's Office, denying all charges against them, reserving the right to assert defenses in the closing written arguments, and offering new witnesses.⁵⁹

112(28) On August 10, 2000, Mrs. Albertina Viana-Lopes, mother of Damião Ximenes-Lopes, requested to be admitted as a civil complainant in the criminal action instituted by the Attorney General's Office (hereinafter, "civil complainant in the criminal action"). On January 26, 2001, the Attorney General's Office consented to the petition, and on March 1, 2001, the *Juzgado de la Tercera Sala de Sobral* (Third Chamber of the Trial Court in and for Sobral) admitted Mrs. Albertina Viana-Lopes as civil complainant in the criminal action.⁶⁰

112(29) From May 24, 2000 and during approximately two years, the *Juzgado de la Tercera Sala de Sobral* (Third Chamber of the Trial Court in and for Sobral) limited itself to holding hearings, of which many were postponed for different reasons, taking place days or months after the original date, as described below:

- a) the hearing scheduled for August 16, 2000, was postponed due to "the unavailability of the judge" in charge of the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral), and was finally held on October 11, 2000, on which date witnesses Francisco Ivo de Vasconcelos, José Cláudio Aguiar and Elias Gomes-Coimbra gave testimony, and the hearing was adjourned "due to time constraints;"⁶¹

Antuns Ferreira-Gomes and Carlos Alberto Rodrigues-dos Santos before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on April 24, 2000 (record of appendixes to the answer to the application, appendix I, volume I, pages 1844 to 1851); and statement made by André Tavares-do Nascimento before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on April 26, 2000 (record of appendixes to the answer to the application, appendix I, volume I, pages 1853 and 1854).

⁵⁹ Cf. answer filed by Maria Salete Morais-Melo de Mesquita with the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on April 27, 2000 (record of appendixes to the answer to the application, appendix I, volume II, page 1856); answer filed by Sérgio Antunes Ferreira Gomes with the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on May 17, 2000 (record of appendixes to the answer to the application, appendix I, volume II, page 1860); answer filed by André Tavares do Nascimento with the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on May 24, 2000 (record of appendixes to the answer to the application, appendix I, volume II, page 1863); and answer filed by Carlos Alberto Rodrigues dos Santos with the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on May 24, 2000 (record of appendixes to the answer to the application, appendix I, volume II, page 1864).

⁶⁰ Cf. petition filed by Albertina Viana-Lopes with the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on August 10, 2000 (record of appendixes to the answer to the application, appendix I, volume II, page 1929); consent by the Attorney General's Office, dated January 26, 2001 (record of appendixes to the answer to the application, appendix I, volume II, page 1933); and order entered by the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on March 1, 2001 (record of appendixes to the answer to the application, appendix I, volume II, page 1934).

⁶¹ Cf. order entered by the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on May 24, 2000 (record of appendixes to the answer to the application, appendix I, volume II, page 1866); certificate from the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral), dated August 16, 2000 (record of appendixes to the answer to the application, appendix I, volume II, page 1873); and statements made by Francisco Ivo de Vasconcelos, José Cláudio

b) the hearing scheduled for February 9, 2001, was postponed by the *Juzgado de la Tercera Sala de Sobral* (Third Chamber of the Trial Court in and for Sobral) "due to unavoidable reasons" to February 16, 2001, on which date witness Francisco das Chagas-Melo was taken testimony;⁶²

c) Antônio Vitorino de Sousa-Rufino, Maria Gorete-Silva, Maria Claudenice Silva-Porfírio and Marcelo Messias-Barros testified on March 13 and 14, 2001, and Idelson Pinto-Batista and João Arnóbio B. de Mesquita testified on May 15 and 21, 2002;⁶³

d) At the hearing held on November 29, 2001, the defense argued that the hearing should be suspended until the mother of the alleged victim was heard, and, as there was no objection from the Attorney General's Office, the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) decided to postpone the hearing, ordered that Mrs. Albertina Viana-Lopes be heard and scheduled a new hearing for March 8, 2002. On March 7, 2002, the Chief of the Clerk's Office for said Trial Court informed that witness subpoenas for the hearing scheduled for the following day were missing. As a result, prosecution witnesses Albertina Viana-Lopes and Irene Ximenes-Lopes-Miranda and defense witnesses José Vilson Barreto-Araújo, Olinda Alexandre de Sousa, Ângela Maria Carvalho- Parente and Maria Verónica Miranda-Bezerra were scheduled to testify on April 12, 2002,⁶⁴ and

Aguiar and Elias Gomes-Coimbra before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on October 11, 2000 (record of appendixes to the answer to the application, appendix I, volume II, pages 1879 to 1892).

⁶² Cf. certificate from the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral), dated February 9, 2001 (record of appendixes to the answer to the application, appendix I, volume II, page 1947); and statement made by Francisco das Chagas-Melo before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on February 16, 2001 (record of appendixes to the answer to the application, appendix I, volume II, pages 1949 to 1952).

⁶³ Cf. statements made by Antônio Vitorino de Sousa-Rufino, Maria Gorete-Silva and Maria Claudenice Silva-Porfírio before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on March 14, 2001 (record of appendixes to the answer to the application, appendix I, volume II, pages 1962 to 1966); statement made by Marcelo Mesias-Barros before the *Segunda Sala Criminal del Juzgado de Fortaleza* (Second Criminal Chamber of the Trial Court in and for Fortaleza) on March 13, 2001 ((record of appendixes to the answer to the application, appendix I, volume II, pages 1980 to 1982); statement made by Idelson Pinto Batista before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on May 15, 2002 (record of appendixes to the answer to the application, appendix I, volume II, pages 2094 to 2096); and statement made by João Arnóbio B. de Mesquita before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on May 21, 2002 (record of appendixes to the answer to the application, appendix I, volume II, pages 2113 to 2116).

⁶⁴ Cf. order issued by the *Jueza Auxiliar de la Séptima Zona Judicial* (Deputy Judge of the Seventh Judicial Region) on June 6, 2001 (record of appendixes to the answer to the application, appendix I, volume II, page 1986); record of the hearing held by the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on November 29, 2001 (record of appendixes to the answer to the application, appendix I, volume II, pages 1993 and 1994); order entered by the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on March 7, 2002 (record of appendixes to the answer to the application, appendix I, volume II, page 2024); statement made by Albertina Viana-Lopes before the *Juzgado Vinculado de Varjota* (Trial Court in and for Varjota) on April 10, 2002 (record of appendixes to the answer to the application, appendix I, volume II, pages 2036 to 2038); and statements made by Irene Ximenes-Lopes-Miranda, José Vilson Barreto-Araújo, Olinda Alexandre de Sousa, Ângela Maria Carvalho-Parente and Maria Verónica Miranda-Bezerra before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on April 12, 2002 (record of appendixes to the answer to the application, appendix I, volume II, pages 2044 to 2056).

e) the hearing scheduled to be held at the *Juzgado de Ipueiras* (Trial Court in and for Ipueiras) on April 24, 2002, for the purposes of hearing a witness residing outside the jurisdiction of Sobral, was canceled due to insufficient notice. A new hearing was scheduled for May 8, 2002, and once again no notice was served on defendant and his defense attorney. As a result, a third date, June 19, 2002, was scheduled to hear the testimony of Antonio Airton-Miranda.⁶⁵

112(30) On December 9, 2002, the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) ordered that the investigation proceedings be closed and directed the parties to file their closing arguments, pursuant to Section 499 of the Brazilian Code of Criminal Procedure.⁶⁶

D.1) *Amendment to accusation and current status of proceedings*

112(31) On May 25, 2000, Prosecutors from the *Centro de Apoyo Operacional de los Grupos Socialmente Discriminados de la Fiscalía General de Justicia* (Center for the Operational Support of Socially Marginalized Groups under the Office of the State Attorney) sent an official letter to Sobral Attorney General's Office Prosecutor, in charge of the prosecution in the case concerning the death of Damião Ximenes-Lopes, in which they stated that "the criminal conduct [of] Francisco Ivo [de] Vasconcelos and Marcelo Messias- Barros[;] of nurse Maria Verónica Miranda-Bezerra and [of] employee José Eliezer Silva- Procopio has been clearly established [from] the statements taken and [...] the reports [produced in the case of Mr. Damião Ximenes-Lopes];" therefore, they pointed out that the amendment to the accusation, for the purpose of investigating the connection of these persons with the death of Damião Ximenes-Lopes, constituted an "institutional and legal imposition."⁶⁷

112(32) On December 12, 2000, Mrs. Irene Ximenes-Lopes Miranda requested the President of the *Comisión de Ciudadanía y Derechos Humanos de la Asamblea Legislativa del estado del Ceará* (Civil and Human Rights Commission of the Legislative Assembly of the state of Ceará) to require the Judge of the *Tercera Sala de Sobral* (Third Chamber of the Trial Court in and for Sobral) the amendment to the accusation against the persons included in the official letter of the Prosecutors from

⁶⁵ Cf. record of the criminal hearing held at the *Juzgado de Ipueiras* (Trial Court in and for Ipueiras) on April 24, 2002 (record of appendixes to the answer to the application, appendix I, volume II, page 2127); record of the criminal hearing held at the *Juzgado de Ipueiras* (Trial Court in and for Ipueiras) on May 8, 2002 (record of appendixes to the answer to the application, appendix I, volume II, page 2132); and statement made by Antonio Airton Miranda before the *Juzgado de Ipueiras* (Trial Court in and for Ipueiras) on June 19, 2002 (record of appendixes to the answer to the application, appendix I, volume II, pages 2143 to 2146).

⁶⁶ Cf. order entered by the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on December 9, 2002 (record of appendixes to the answer to the application, appendix I, volume II, page 2148).

⁶⁷ Cf. official letter No.56/2000 sent by Prosecutors from the *Centro de Apoyo Operacional de los Grupos Socialmente Discriminados de la Fiscalía General de Justicia* (Center for the Operational Support of Socially Marginalized Groups under the Office of the State Attorney) to Sobral Attorney General's Office Prosecutor on May 25, 2000 (record of appendixes to the answer to the application, appendix I, volume II, pages 1911 to 1925).

the *Centro de Apoyo Operacional de los Grupos Socialmente Discriminados de la Fiscalía General de Justicia* (Center for the Operational Support of Socially Marginalized Groups under the Office of the State Attorney).⁶⁸

112(33) On September 22, 2003, the Attorney General's Office Prosecutor filed her closing arguments in the criminal proceedings relating to the death of Mr. Damião Ximenes-Lopes and a the motion to amend the accusation in respect of Messrs. Francisco Ivo de Vasconcelos and Elias Gomes-Coimbra for maltreatment resulting in death, as defined in the Brazilian Penal Code, Section 136, paragraph 2, to the detriment of Mr. Damião Ximenes-Lopes.⁶⁹

112(34) On June 17, 2004, the Judge of the *Tercera Sala de Sobral* (Third Chamber of the Trial Court in and for Sobral), after acknowledging that the Court was falling behind with its work due to heavy workload and stating that he himself had not been in office for 90 days (30-day vacation in January, plus 60 days on sick leave between February and April 2004), received the amendment to the accusation and ordered to summon the new defendants to appear in court to be examined. Notwithstanding the foregoing, the Judge reiterated the requirement that the civil complainant in the criminal action and the defense attorneys file their closing arguments "forthwith."⁷⁰

112(35) On August 30, 2004, it was not possible to examine the new defendants as no notice was served on the attorney for the civil complainant in the criminal action and some defense attorneys; therefore the Judge of the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral), "for reasons of expediency," scheduled a new hearing for September 9, 2004.⁷¹

112.36. On October 22, 2004, Mr. Elias Gomes-Coimbra's defense counsel pleaded his innocence and offered witnesses to be called at hearing. That same day, Mr. Francisco Ivo de Vasconcelos raised preliminary objections, argued the legal and factual insufficiency of the allegations made by the Attorney General's Office, denied the charges brought against him, and offered witness testimony.⁷²

⁶⁸ Cf. letter sent by Irene Ximenes-Lopes-Miranda to the President of the *Comisión de Ciudadanía y Derechos Humanos de la Asamblea Legislativa del estado del Ceará* (Civil and Human Rights Commission of the Legislative Assembly of the state of Ceará) on December 12, 2000 (record of the appendixes to the answer to the application, appendix I, volume II, page 1908).

⁶⁹ Cf. closing arguments filed by the Attorney General's Office Prosecutor with the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on September 22, 2003 (record of appendixes to the answer to the application, appendix I, volume II, pages 2166 to 2172); and motion to amend the accusation filed by the Attorney General's Office Prosecutor with the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on September 22, 2003 (record of appendixes to the answer to the application, appendix I, volume II, pages 2174 to 2178).

⁷⁰ Cf. order entered by the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on June 17, 2004 (record of appendixes to the answer to the application, appendix I, volume II, page 2180); and summons to defendants Francisco Ivo de Vasconcelos and Elias Gomes-Coimbra issued by the Clerk's Office for the *Tercera Sala de Sobral* (Third Chamber of the Trial Court in and for Sobral) on August 25, 2004 (record of appendixes to the answer to the application, appendix I, volume II, page 2189).

⁷¹ Cf. record of the hearing held at the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on August 30, 2004 (record of appendixes to the answer to the application, appendix I, volume II, page 2235).

⁷² Cf. preliminary objections filed by Elias Gomes-Coimbra with the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on October 10, 2004 (record of appendixes to

112(37) José Cláudio Aguiar, Maria Gorete-Silva and Maria Verónica Miranda-Becerra testified on December 3 and 16, 2004.⁷³

112(38) After the opening of the hearing held on September 9, 2004, scheduled for the purpose of examining the new defendants, the Judge of the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) pointed out that “the complexity of the facts, the number of defendants in the case and, above all, the successive statements made by human rights organizations have delayed the resolution of the case.” In addition, the judge stated that the “proceedings necessary for the proper processing of the case have not been duly carried out,” and that the absence of attorneys to represent three of the defendants made it impossible to conduct the interrogatory; therefore, the judge scheduled the hearing for October 19, 2004 and reiterated the requirement that the civil complainant in the criminal action and the defense attorneys for the original defendants file their closing arguments.⁷⁴

112(39) During the same hearing, the defense counsel for Mr. Sérgio Antunes-Ferreira-Gomes, accused in the original accusation, filed a motion to stay [the requirement of] filing the closing arguments,” arguing that the introduction of new evidence, as a necessary consequence of the existence of new defendants, could benefit or harm the original defendants, and that the completion of their trial before the conclusion of the investigation proceedings against those who were subsequently accused might lead to a discrepancy between the first and second decisions to be rendered by the Court. Based on such request, the Judge ordered that, after the hearing scheduled for October 19, 2004, the records of the case be transmitted to him for decision on the motion.⁷⁵

112(40) The interrogatory of defendants Francisco Ivo de Vasconcelos and Elias Gomes-Coimbra was conducted on October 19, 2004.⁷⁶

112(41) The hearing scheduled for January 26, 2005 to hear witness Francisco das Chagas-Melo’s testimony was postponed to March 2, 2005 based on lack of notice to defendant Carlos Alberto Rodrigues-dos Santos.⁷⁷

the answer to the application, appendix I, volume II, pages 2277 and 2278); and preliminary objections filed by Francisco Ivo de Vasconcelos with the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on October 10, 2004 (record of appendixes to the answer to the application, appendix I, volume II, pages 2272 to 2275).

⁷³ Cf. statements made by José Cláudio Aguiar and Maria Gorete-Silva before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on December 3, 2004 (record of appendixes to the answer to the application, appendix I, volume II, pages 2283 to 2288); and statement made by Maria Verónica Miranda-Bezerra before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on December 16, 2004 (record of appendixes to the answer to the application, appendix I, volume II, pages 2296 to 2300).

⁷⁴ Cf. record of the hearing held at the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on September 9, 2004 (record of appendixes to the answer to the application, appendix I, volume II, pages 2254 and 2255).

⁷⁵ Cf. record of the hearing held at the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on September 9, 2004, *supra* note 74.

⁷⁶ Cf. statements made by Francisco Ivo de Vasconcelos and Elias Gomes-Coimbra before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on October 19, 2004 (record of appendixes to the answer to the application, appendix I, volume II, pages 2260 and 2268).

⁷⁷ Cf. record of the hearing held at the *Juzgado de Ipueiras* (Trial Court in and for Ipueiras) on January 26, 2005 (record of appendixes to the answer to the application, appendix I, volume II, page

112(42) On February 14, 2005, the Clerk's Office for the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) transmitted "the records of the case" to the Judge for decision on the motion to stay the filing of closing arguments. Since then, the Court has proceeded to conduct hearings for the purpose of taking the testimony of Mr. Francisco das Chagas-Melo and Mrs. Albertina Viana-Lopes, and to subpoena the witnesses of the defendants included in the amendment to the accusation. The criminal proceedings concerning the death of Damião Ximenes-Lopes are presently suspended, pending the interlocutory order regarding the motion to stay the filing of closing arguments.⁷⁸

112(43) The criminal proceedings were commenced on March 27, 2000 by an accusation filed by the Attorney General's Office, and up to the date of this Judgment no decision has been rendered by the trial court.

E) *Civil action for damages*

112(44) On July 6, 2000 Albertina Viana-Lopes brought an action for moral damages in the *Quinta Sala Civil* (Fifth Civil Chamber) against *Casa de Reposo Guararapes* (Guararapes Rest Home), Sérgio Antunes-Ferreira-Gomes and Francisco Ivo de Vasconcelos for the "pain, grief, suffering and humiliation that [...] she experienced and will experience for the rest of her life" as a result of the death of her son, Damião Ximenes-Lopes.⁷⁹

112(45) On October 2, 2000, the representatives of *Casa de Reposo Guararapes* (Guararapes Rest Home) and defendants Sérgio Antunes-Ferreira-Gomes and Francisco Ivo de Vasconcelos filed an answer to the complaint for damages filed against them by Mrs. Albertina Viana-Lopes.⁸⁰

2326); and record of the hearing held at the *Juzgado de Ipueiras* (Trial Court in and for Ipueiras) on March 2, 2005 (record of the merits of the case, volume IV, pages 701 to 710).

⁷⁸ Cf. order entered by the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on February 14, 2005 (record of appendixes to the answer to the application, appendix I, volume II, page 2327); record of the hearing held at the *Juzgado de Varjota* (Trial Court in and for Varjota) on April 5, 2005 (record of the merits of the case, volume IV, pages 712 and 713); and subpoena issued by the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on November 17, 2005 (record of the merits of the case, volume IV, page 715).

⁷⁹ Cf. brief filed by Albertina Viana-Lopes with the *Quinta Sala Civil* (Fifth Civil Chamber) on July 6, 2000 (record of appendixes to the answer to the application, appendix II, pages 2329 to 2343).

⁸⁰ Cf. brief filed by the representatives of *Casa de Reposo Guararapes* (Guararapes Rest Home) with the *Quinta Sala Civil* (Fifth Civil Chamber) on October 2, 2000 (record of appendixes to the answer to the application, appendix II, pages 2403 and 2411); brief filed by Sérgio Antunes Ferreira Gomes with the *Quinta Sala Civil* (Fifth Civil Chamber) on October 2, 2000 (record of appendixes to the answer to the application, appendix II, pages 2413 to 2422); and brief filed by Francisco Ivo de Vasconcelos with the *Quinta Sala Civil* (Fifth Civil Chamber) on October 2, 2000 (record of appendixes to the answer to the application, appendix II, pages 2424 to 2429).

112(46) On November 17, 2000, Mrs. Albertina Viana-Lopes filed a reply to the answer of *Casa de Reposo Guararapes* (Guararapes Rest Home) and of Messrs. Sérgio Antunes-Ferreira-Gomes and Francisco Ivo de Vasconcelos to the complaint.⁸¹

112(47) On December 6, 2000 the *Quinta Sala Civil* (Fifth Civil Chamber) scheduled the conciliation conference for March 1, 2001. On said date, the *Quinta Sala Civil* (Fifth Civil Chamber), without offering any explanation, rescheduled the conference for March 15, 2001, on which date the conference was held, but there were no conciliatory gestures from the parties.⁸²

112(48) On August 15, 2003 the *Quinta Sala Civil* (Fifth Civil Chamber) requested the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) detailed information on the criminal proceedings pending before said Court regarding the death of Mr. Damião Ximenes-Lopes and on the status of such proceedings. On August 19, 2003, the Judge of the *Tercera Sala de Sobral* (Third Chamber of the Trial Court in and for Sobral) informed that the proceedings were at the closing arguments stage, as set forth in Section 499 of the Code of Criminal Procedure. On August 29 of the same year, the *Quinta Sala Civil* (Fifth Civil Chamber) decided to stay the civil proceedings for a maximum of one year pending the outcome of the criminal proceedings.⁸³

112(49) On October 15, 2004, the *Quinta Sala Civil* (Fifth Civil Chamber) requested the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) to advise whether judgment had been entered in the case of Mr. Damião Ximenes-Lopes and, if so, to transmit a copy thereof. On October 21, 2004 the *Tercera Sala de Sobral* (Third Chamber of the Trial Court in and for Sobral) informed that on September 24 of that same year the accusation was amended to include Messrs. Elias Gomes-Coimbra and Francisco Ivo de Vasconcelos as defendants, whose testimony was taken on October 19, 2004 and that, as regards to all other defendants, the proceedings were suspended pending decision on a motion to stay the filing of closing arguments filed by one of the defense attorneys⁸⁴ (*supra* para. 112(42)). Up to the date of this judgment, no judgment has been rendered by the trial court in the civil action for damages.

⁸¹ Cf. brief filed by Albertina Viana-Lopes with the *Quinta Sala Civil* (Fifth Civil Chamber) on November 17, 2000 (record of appendixes to the answer to the application, appendix II, pages 2446 to 2448).

⁸² Cf. order entered by the *Quinta Sala Civil* (Fifth Civil Chamber) on December 6, 2000 (record of appendixes to the answer to the application, appendix II, page 2450); order entered by the *Quinta Sala Civil* (Fifth Civil Chamber) on March 1, 2001 (record of appendixes to the answer to the application, appendix II, pages 2463 and 2464); and record of the conference held at the *Quinta Sala Civil* (Fifth Civil Chamber) on March 15, 2001 (record of appendixes to the answer to the application, appendix II, pages 2466 and 2467).

⁸³ Cf. order entered by the *Quinta Sala Civil* (Fifth Civil Chamber) on August 15, 2003 (record of appendixes to the answer to the application, appendix II, page 2576); official letter No. 521/03 issued by the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on August 19, 2003 (record of appendixes to the answer to the application, appendix II, page 2580); and order entered by the *Quinta Sala Civil* (Fifth Civil Chamber) on August 29, 2003 (record of appendixes to the answer to the application, appendix II, page 2582).

⁸⁴ Cf. order entered by the *Quinta Sala Civil* (Fifth Civil Chamber) on October 15, 2004 (record of appendixes to the answer to the application, appendix II, page 2633); official letter No. 1545/04 issued by the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on October 21, 2004 (record of appendixes to the answer to the application, appendix I, volume II, page 2636).

e) *Exhumation of the body of Mr. Damião Ximenes-Lopes*

112(50) On March 15, 2001, the *Quinta Sala Civil* (Fifth Civil Chamber) decided to grant the petition filed by the representatives of Casa de Reposo Guararapes (Guararapes Rest Home) for the post-exhumation examination of the body of Mr. Damião Ximenes-Lopes and ordered the Director of the Forensic Unit to appoint two experts to conduct the examination.⁸⁵

112(51) On March 25 and 27, 2001, Mrs. Albertina Viana-Lopes and defendant Francisco Ivo de Vasconcelos filed a brief containing the issues to be analyzed in the expert examination of the body of Mr. Damião Ximenes-Lopes.⁸⁶

112(52) On March 26, 2001, the representative of *Casa de Reposo Guararapes* (Guararapes Rest Home) withdrew the petition for exhumation. On June 19 of the same year, Albertina Viana-Lopes argued in favor of performing the expert examination in order to arrive at the truth. On June 20, 2001, the *Quinta Sala Civil* (Fifth Civil Chamber) resolved to uphold the exhumation order.⁸⁷

112(53) On September 24, 2001, the *Quinta Sala Civil* (Fifth Civil Chamber) once again requested the Director of the Forensic Unit of the Medico-Legal Institute to appoint two experts to conduct the exhumation. Said request was reiterated on October 30, 2001.⁸⁸

112(54) On February 21, 2002, the Technical-Scientific Department of Dr. Walter Porto Medico-Legal Institute scheduled the exhumation of the body of Mr. Damião Ximenes-Lopes for April 6, 2002 at 8.00 am, and designated two experts for such purposes. The expert examination was conducted on April 6, 2002, and it was concluded that the case of Mr. Damião Ximenes-Lopes was a death of “unknown cause” (*supra* para. 112.16).⁸⁹

⁸⁵ Cf. record of the hearing held at the *Quinta Sala Civil* (Fifth Civil Chamber) on March 15, 2001 (record of appendixes to the answer to the application, appendix II, pages 2466 and 2467).

⁸⁶ Cf. brief filed by Francisco Ivo de Vasconcelos with the *Quinta Sala Civil* (Fifth Civil Chamber) on March 25, 2001 (record of appendixes to the answer to the application, appendix II, pages 2468 and 2469); and brief filed by Albertina Viana-Lopes with the *Quinta Sala Civil* (Fifth Civil Chamber) on March 27, 2001 (record of appendixes to the answer to the application, appendix II, pages 2470 and 2471).

⁸⁷ Cf. brief filed by Francisco Ivo de Vasconcelos with the *Quinta Sala Civil* (Fifth Civil Chamber) on March 26, 2001 (record of appendixes to the answer to the application, appendix II, pages 2473 and 2474); brief filed by Albertina Viana-Lopes with the *Quinta Sala Civil* (Fifth Civil Chamber) on June 19, 2001 (record of appendixes to the answer to the application, appendix II, pages 2500 and 2501); and order entered by the *Quinta Sala Civil* (Fifth Civil Chamber) on June 20, 2001 (record of appendixes to the answer to the application, appendix II, pages 2502 and 2503).

⁸⁸ Cf. order entered by the *Quinta Sala Civil* (Fifth Civil Chamber) on September 11, 2001 (record of appendixes to the answer to the application, appendix II, page 2512 and 2513); official letter No. 372/2001 issued by the *Quinta Sala Civil* (Fifth Civil Chamber) on September 24, 2001 (record of appendixes to the answer to the application, appendix II, page 2514); and official letter No. 468-M/2001 issued by the *Quinta Sala Civil* (Fifth Civil Chamber) on October 30, 2001 (record of appendixes to the answer to the application, appendix II, page 2522).

⁸⁹ Cf. official letter No. 170/200-CPD-02 issued by the Technical-Scientific Department of Dr. Walter Porto Medico-Legal Institute on February 21, 2002 (record of appendixes to the answer to the application, appendix II, page 2525); official letter No. 795/2002 issued by the *Comisaría Regional de Sobral* (Sobral Regional Police Station) on May 2, 2002 (record of appendixes to the answer to the application, appendix

G) *Casa de Reposo Guararapes (Guararapes Rest Home)*

112(55) *Casa de Reposo Guararapes* (Guararapes Rest Home) was a private hospital owned by Sérgio Antunes Ferreira Gomes, which was contracted by the State to provide psychiatric services under the direction of the *Sistema Único de Salud* (Single Health Care System) and operated as a public health care unit in the name and on behalf of the State. In October 1999, approximately 54 inpatient beds of said hospital were affiliated with the *Sistema Único de Salud* and the people occupying those beds were patients of the public health care system. It was the only institution, public or private, offering inpatient or outpatient services for persons with mental disabilities in the region of Sobral; a city located 200 km from the city of Fortaleza, capital city of the state of Ceará.⁹⁰

112(56) At *Casa de Reposo Guararapes* (Guararapes Rest Home) there was an atmosphere of violence, aggression, and maltreatment, where many inpatients frequently suffered injuries to their upper and lower extremities, which were inflicted by the employees of *Casa de Reposo Guararapes*; nurses' aides and security guards used patients to restrain others; applied the "gravata" (a restraint method which carries the risk of asphyxiation) to some patients, who thought that such practice "was the law" or was intended "to maintain order"; physical restraint was indiscriminately used, regardless of whether such procedure had been ordered by the physician in charge, and physical confrontations between patients were encouraged.⁹¹

II, pages 2548 and 2549); and report of the autopsy (exhumation) conducted by Dr. Walter Porto Medico-Legal Institute on the body of Mr. Damião Ximenes-Lopes on April 6, 2002, *supra* note 48.

⁹⁰ Cf. Administrative Resolution No. 026 issued by the *Secretaría de Salud y Asistencia Social del Municipio de Sobral* (Health and Social Services Bureau for the Municipality of Sobral) on March 2, 2000 (record of appendixes to the application, appendix 2, pages 76 to 81); Administrative Resolution No. 113 issued by the *Secretaría de Salud y Asistencia Social del Municipio de Sobral* (Health and Social Services Bureau for the Municipality of Sobral) on July 10, 2000 (record of appendixes to the application, appendix 3, pages 82 and 83); statement made by Francisco Ivo de Vasconcelos before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on August 16, 2000 (record of appendixes to the application, appendix 4, pages 84 to 89); and brief filed by Sérgio Antunes Ferreira Gomes with the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on March 26, 2001 (record of appendixes to the application, appendix 7, pages 95 and 96).

⁹¹ Cf. report issued by the *Grupo de Acompañamiento y Evaluación de la Asistencia Psiquiátrica Hospitalaria* (Hospital Psychiatric Care Support and Evaluation Group) on November 5, 1999 (record of appendixes to the application, appendix 18, pages 118 to 146); report on the Administrative Investigation prepared at the request of the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social* (Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau), issued on February 18, 2000, *supra* note 43; statement made by Francisco das Chagas Melo before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on February 16, 2001, *supra* note 62; and statement made by Carlos Alberto Rodrigues dos Santos before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on April 24, 2000 (record of appendixes to the application, appendix 12, pages 108 to 110); and record in the Daily Log Book of *Casa de Reposo Guararapes* (Guararapes Rest Home) of December 29, 1999 (record of appendixes to the application, appendix 13, page 111).

112(57) Confinement conditions at *Casa de Reposo Guararapes* (Guararapes Rest Home) were inhuman and degrading; as the Hospital did not have a doctor's office for a long time, medical attention was frequently provided to patients at the reception and even in the presence of visitors and, more often than not, no proper medication was available. The hospital did not meet the required standards and did not conform to professional medical ethics.⁹²

112(58) In the context of violence against patients, and prior to the death of Mr. Damião Ximenes-Lopes, at least two persons died violent deaths at *Casa de Reposo Guararapes* (Guararapes Rest Home), which may have involved beating about the head with a blunt instrument, and where patients were admitted to the hospital in good physical condition and died during hospitalization.⁹³ Raimunda Ferreira de Sousa and Gerardo Alves da Silva died at *Casa de Reposo Guararapes* in October 1987 and February 1991 respectively.

112(59) Reports of maltreatment and offenses against patients, such as a rape allegation and one involving a nurse's aide who allegedly broke a patient's arm, were not investigated by the management of *Casa de Reposo Guararapes* (Guararapes Rest Home), whose director president, Mr. Sérgio Antunes-Ferreira-Gomes, never visited the institution or maintained any contact with the medical or nursing staff or inpatients' families.⁹⁴

H) *Intervention of Casa de Reposo Guararapes* (Guararapes Rest Home)

112(60) On October 13, 1999, Albertina Viana-Lopes filed a complaint with the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social* (Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau) against *Casa de Reposo Guararapes* (Guararapes Rest Home), in

⁹² Cf. report issued by the *Grupo de Acompañamiento y Evaluación de la Asistencia Psiquiátrica Hospitalaria* (Hospital Psychiatric Care Support and Evaluation Group) on November 5, 1999, *supra* note 91; report on the Administrative Investigation prepared at the request of the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social* (Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau), issued on February 18, 2000, *supra* note 43; and statement made by Francisco Ivo de Vasconcelos before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on August 16, 2000, *supra* note 90.

⁹³ Cf. statement made by Maria Expedita Sousa Lira before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on February 15, 2000, *supra* note 55; and statement made by Maria Gorete Silva before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on February 15, 2000, *supra* note 55.

⁹⁴ Cf. report on the Administrative Investigation prepared at the request of the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social* (Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau), issued on February 18, 2000, *supra* note 43; report issued by the *Grupo de Acompañamiento y Evaluación de la Asistencia Psiquiátrica Hospitalaria* (Hospital Psychiatric Care Support and Evaluation Group) on November 5, 1999, *supra* note 91; statement made by Francisco das Chagas Melo before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on February 16, 2001, *supra* note 62; statement made by Carlos Alberto Rodrigues dos Santos before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on April 24, 2000, *supra* note 41; record in the Daily Log Book of *Casa de Reposo Guararapes* (Guararapes Rest Home) of December 29, 1999, *supra* note 91; and statement made by Francisco Ivo de Vasconcelos before the *Tercera Sala del Juzgado de Sobral* (Third Chamber of the Trial Court in and for Sobral) on August 16, 2000, *supra* note 90.

which she described the circumstances surrounding the death of her son, Damião Ximenes-Lopes, on October 4, 1999.⁹⁵

112(61) On October 18, 1999 the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social* (Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau), by order of the Municipal Secretary of Health and Social Services of the Municipality of Sobral, issued Administrative Resolution No. 001/CCAA, ordering the creation an Administrative Investigation Commission** to inquiry into the facts reported by Albertina Viana-Lopes. On February 18, 2000, the Administrative Investigation Commission, after two supervisory visits to *Casa de Reposo Guararapes* (Guararapes Rest Home), interviewing nineteen people and analyzing several documents, issued its final report, in which it concluded that *Casa de Reposo Guararapes* “[did] not meet the required standards and [did] not conform to professional medical ethics.”⁹⁶

112(62) The last inspection at Casa de Reposo Guararapes (Guararapes Rest Home) was carried out on May 15, 1996 by the *Grupo de Acompañamiento de Asistencia Psiquiátrica del Ministerio de Salud (GAP)* (Psychiatric Care Support Group of the Ministry of Health), on which occasion it was recommended that two infirmaries of the *Casa de Reposo Guararapes* (Guararapes Rest Home), which operated in a place known as the “basement” be closed due to poor operating conditions, leaks and other irregularities. In addition, the report documented the fact that patients outnumbered available hospital beds, which evidenced the existence of the so-called “floor beds”, which meant that patients were sleeping on the floor.⁹⁷

112(63) On October 21, 1999, the *Departamento de Vigilancia Sanitaria de la Secretaría de Salud y Asistencia Social* (Sanitary Surveillance Department of the Health and Social Services Bureau) conducted an inspection at *Casa de Reposo Guararapes* (Guararapes Rest Home), and reported the following findings:

from the point of view of sanitary surveillance [...] all actions and services at *Casa de Reposo Guararapes* do not comply with reasonable identity and quality standards [...]. In addition, [...] it was verified that:

- hospital unit does not provide staff with personal protection equipment ; [...]
- staff has not been vaccinated against tetanus or hepatitis B;
- no recreational activities are offered to patients;

⁹⁵ Cf. report on the Administrative Investigation prepared at the request of the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social* (Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau), issued on February 18, 2000, *supra* note 43; and complaint filed by Albertina Viana-Lopes with the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social* (Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau) on October 13, 1999, *supra* note 49.

** In the original, in Portuguese: *Comissão de Sindicância*.

⁹⁶ Cf. Administrative Resolution No. 001/CCAA issued by the Control, Evaluation and Audit Municipal Coordinator on October 18, 1999 (record of appendixes to the answer to the application, appendix I, volume I, page 1548); and report on the Administrative Investigation prepared at the request of the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social* (Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau), issued on February 18, 2000, *supra* note 43.

⁹⁷ Cf. report issued by the *Grupo de Acompañamiento y Evaluación de la Asistencia Psiquiátrica Hospitalaria* (Hospital Psychiatric Care Support and Evaluation Group) on November 5, 1999, *supra* note 91; and statement made by Lídia Dias Costa on July 31, 2003 (record of appendixes to the brief of requests, arguments and evidence, appendix 1, pages 897 to 903).

- patients are secluded in inadequate areas, without proper structure and hygiene;
- food storage is inadequate, which causes food to decay;
- inadequate use of refrigerator;
- tables in the dining room are covered with plastic screwed onto them, [making] proper cleaning difficult.
- fuse box is damaged, which can cause accidents;
- poor hygienic conditions (ceiling, walls and floor need cleaning) [, and]
- poor sanitary conditions (bathrooms [are] in bad conditions [, and] with no showers, washbasins, waste baskets, and toilets [are] dirty and without seat covers.

[Therefore,] these findings [...] suggest the need [to adopt] maintenance and other measures [...] for the promotion of health and quality of life [...] at *Casa de Reposo Guararapes*⁹⁸

112(64) On November 4, 1999, the *Secretaría de Salud y Asistencia Social* (Health and Social Services Bureau) sent an official letter to the Administrative Department of *Casa de Reposo Guararapes* (Guararapes Rest Home), in reference to a visit conducted by the Control, Evaluation and Audit Coordinator and the Physician of the Audit Municipal System, during which the following irregularities were identified:

- a) absence of ward doctor;
- b) no oxygen, "secretion aspirator," vaporizer, and other medical instruments in the emergency room;
- c) no treatment room or "medication cart;"
- d) the areas allocated for the equipment in b and c are in poor hygienic conditions, and
- e) medical records do not include progress and detailed follow-up reports to be prepared by social services, psychology, occupational therapy and (senior) nursing staff, "which are of paramount importance in mental health care."

Based on these findings, the Health and Social Services Bureau gave *Casa de Reposo Guararapes* (Guararapes Rest Home) a period of 15 days to cure such irregularities, and advised that failure to do so would result in cancellation of authorizations for hospital admissions.⁹⁹

112(65) On November 5, 1999, divisions of the Health and Social Services Bureau conducted a joint inspection at *Casa de Reposo Guararapes* (Guararapes Rest Home), and reported the following findings:

- a) according to the interviews conducted with patients, there is maltreatment, especially against male patients, and such treatment begins when patients are taken to *Casa de Reposo Guararapes* by the police;
- b) It seems strange that the Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau did not deactivate

⁹⁸ Cf. inspection conducted by the *Vigilancia Sanitaria de la Secretaría de Salud y Asistencia Social* (Sanitary Surveillance Department of the Health and Social Services Bureau) on October 21, 1999 (record of appendixes to the answer to the application, appendix I, volume I, pages 1551 to 1553).

⁹⁹ Cf. official letter No. 1024/99 issued by the *Secretaría de Salud y Asistencia Social* (Health and Social Services Bureau) on November 4, 1999 to the Administrative Department of *Casa de Reposo Guararapes* (Guararapes Rest Home) (record of appendixes to the answer to the application, appendix I, volume I, page 1549).

Ulises Pernambucano Unit, given that it had been included in an earlier report, dated May 15, 1996;

c) Alice Ferreira-Gomes and Ulises Pernambucano Units must be deactivated, and

d) the lack of management at *Casa de Reposo Guararapes* is apparent. The people that assume that role in practice have no decision-making authority and the owner is rarely present.

The inspection revealed that *Casa de Reposo Guararapes* (Guararapes Rest Home) did not satisfy the required operating conditions and recommended the intervention of the Municipality of Sobral together with the Health and Social Services Bureau, a change of administration, or the revocation of the license to provide services within the *Sistema Único de Salud* (Single Health Care System). As regards to the death of Mr. Damião Ximenes-Lopes, the inspection revealed that he received poor medical attention and maltreatment.¹⁰⁰

112(66) On February 29, 2000, the *Consejo Municipal de Salud* (Municipal Health Board), based on the findings of the report issued by the Administrative Investigation Commission, decided, by means of Resolution/CMSS No. 001/2000, the intervention of Casa de Reposo Guararapes (Guararapes Rest Home) by a health care municipal division. On March 2, 2000, the Secretary of Health and Social Services decided to appoint an intervening board to *Casa de Reposo Guararapes* for a period of ninety days, which was extended for 30 days, for the purpose of effecting a technical and administrative reorganization, and monitoring the resources allocated to said hospital by the *Sistema Único de Salud* (Single Health Care System).¹⁰¹

112(67) After a 120-day intervention, on July 10, 2000, the Health and Social Services Bureau, by means of Administrative Resolution No. 113, ordered "to revoke *Casa de Reposo Guararapes* accreditation as a psychiatric institution to provide services to the [*Sistema Único de Salud* (Single Health Care System)] in the area of psychiatric hospital care."¹⁰²

I) Pensions

112(68) Mr. Damião Ximenes-Lopes received from the *Instituto Nacional de Seguridad Social* (National Institute of Social Security) a state disability pension. Following his death and in accordance with Law No. 8212, Section 3, a general law applicable nationwide which sets forth that "the purpose of social security is to ensure its beneficiaries adequate provision for their support as a result of disability [...] confinement, or death of persons in respect of whom they were dependants," Albertina Viana-Lopes became eligible to receive death pension on account of being

¹⁰⁰ Cf. joint audit of the *Secretaría de Salud y Asistencia Social* (Health and Social Services Bureau) conducted at *Casa de Reposo Guararapes* (Guararapes Rest Home) on November 5, 1999 (record of appendixes to the answer to the application, appendix I, volume I, pages 1625 to 1637).

¹⁰¹ Cf. Administrative Resolution No. 026 issued by the Secretary of Health and Social Services on March 2, 2000, *supra* note 90; and official letter No. 232/2000/SSAS issued by the Secretary of Health and Social Services to the Attorney General's Office representative in the criminal proceedings concerning the death of Damião Ximenes-Lopes on March 3, 2000 (record of appendixes to the answer to the application, appendix I, volume I, pages 1419 and 1420).

¹⁰² Cf. Administrative Resolution No. 113 issued by the *Secretaría de Salud y Asistencia Social* (Health and Social Services Bureau) of the Municipality of Sobral on July 10, 2000, *supra* note 90.

the only dependant of Mr. Damião Ximenes-Lopes. The pension benefit from the *Instituto Nacional de Seguridad Social* (National Institute of Social Security) to which Albertina Viana-Lopes became entitled is, as of the date of this Judgment, BRL350.00 (three hundred and fifty Brazilian *Reales*).¹⁰³ This pension is awarded irrespective of the cause and circumstances surrounding the death.

112.69. On June 16, 2004, by the unilateral decision of the Legislative Assembly, the state of Ceará enacted Law No. 13,491, which granted “in favor of Albertina Viana-Lopes, mother of Mr. Damião Ximenes-Lopes, who died at *Casa de Reposo Guararapes* (Guararapes Rest Home), in the city of Sobral, state of Ceará, on October 4, 1999,” a monthly life pension, equal to the minimum wage in the state of Ceará, linked to the annual general index applicable to state servants, and which, as of May 2006, was BRL323.40 (three hundred, twenty-three Brazilian *Reales* and forty cents).¹⁰⁴

J) *Next of kin of Mr. Damião Ximenes-Lopes*

112(70) Albertina Viana-Lopes and Irene Ximenes-Lopes Miranda, mother and sister of Mr. Damião Ximenes-Lopes respectively have suffered physical and psychological distress as a result of the alleged victim’s death. Mrs. Albertina Viana-Lopes has suffered depression and health problems, such as nervous gastritis and duodenal ulcer. Irene Ximenes-Lopes Miranda suffered from depression for over three years. After the death of his brother, she stopped breastfeeding her newborn daughter. She stopped working and did not complete her employment contract, which expired on December 31, 2004. In the quest for justice she embarked on before judicial authorities and human rights bodies as a result of the events giving rise to this case, she has constantly suffered and relived the circumstances surrounding the death of Mr. Damião Ximenes-Lopes and has had to be away from her family for extended periods of time.¹⁰⁵

112(71) Francisco Leopoldino Lopes and Cosme Ximenes-Lopes, father and brother of Mr. Damião Ximenes-Lopes respectively have suffered as a result of the alleged victim’ s death. Mr. Francisco Leopoldino Lopes maintained family ties with

¹⁰³ Cf. letter of benefit award from the *Instituto Nacional de Previsión Social* (National Institute of Social Security) addressed to Albertina Viana-Lopes, dated November 21, 1999 (record of appendixes to the answer to the application, appendix II, pages 2348 and 2349).

¹⁰⁴ Cf. Law No. 13.491 of June 16, 2004 (record of proceedings before the Commission, volume I, page 359); and life pension payment slips of Albertina Viana-Lopes issued by the state of Ceará - printed from the Internet- on June 21, 2006 (record of evidence to facilitate adjudication of the case, pages 3706 to 3721). The amount of the pension benefit according to the most recent “payment slip” of May 2006 submitted by the State is BRL323.40 (three hundred, twenty-three Brazilian *Reales* and forty cents) and the total amount to be paid is BRL416.00 (four hundred and sixteen Brazilian *Reales*) because it includes a “remunerative component” of BRL92.60 (ninety-two Brazilian *Reales* and sixty cents).

¹⁰⁵ Cf. statement made by Irene Ximenes-Lopes Miranda during the public hearing held before the Inter-American Court on November 30, 2005, *supra* note 38; complaint filed by Albertina Viana-Lopes with the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social* (Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau) on October 13, 1999, *supra* note 49; report prepared by psychiatrist Lidia Días-Costa, at the request of Irene Ximenes-Lopes Miranda, submitted on December 14, 2002, *supra* note 38; and report on the Administrative Investigation prepared at the request of the *Coordinadora Municipal de Control, Evaluación y Auditoría de la Secretaría de Salud y Asistencia Social* (Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau), issued on February 18, 2000, *supra* note 38.

his son, Damião Ximenes-Lopes, and has grieved over his death. Mr. Cosme Ximenes-Lopes, twin brother of the alleged victim, who has also been admitted to psychiatric institutions, maintained a close bond and he identified with Mr. Damião Ximenes-Lopes. After hearing the news of his brother's death, he went in a state of shock. He later suffered from depression and stopped working for a while.¹⁰⁶

VIII
VIOLATION OF ARTICLES 4(1) AND 5(1) AND 5(2) OF THE AMERICAN
CONVENTION
IN RELATION TO ARTICLE 1(1) THEREOF
(Right to Life, Humane Treatment, and Obligation to Respect Rights)

Arguments of the Commission

The Commission alleged, *inter alia*, that:

a) Regarding the violation of the right to life:

i. the State has not complied with its duty to protect and preserve the life of Mr. Damião Ximenes-Lopes. This violation is evidenced not only by the fact that the State agents caused his death, but also by the failure of the State to properly control the *Casa de Reposo Guararapes* (Guararapes Rest Home), and

ii. the lack of a serious investigation about the facts and of the failure to punish the persons liable for the death of Mr. Ximenes-Lopes is a violation by the State of its duty to guarantee the right to life.

b) Regarding the violation of the right to humane treatment:

i. the hospitalization conditions at the *Casa de Reposo Guararapes* were in and of themselves incompatible with the respect for the dignity of the human person; Mr. Damião Ximenes-Lopes was subjected to inhuman or degrading treatment because of the mere fact of having been admitted to said institution as a patient of Brazil Single Health System (SUS), and

ii. the physical containment techniques applied to Mr. Ximenes-Lopes were not in accordance with the international standards in this field. The alleged victim was not nursed in decent conditions, nor was he under the care and the regular and immediate supervision of qualified mental health personnel.

c) Regarding acquiescence, it is in accordance with the acknowledgment made by the State; there is no controversy as to the facts prior to the death of Mr. Damião Ximenes-Lopes which are set forth in the complaint.

Arguments of the representatives

114. The representatives alleged, *inter alia*, that:

¹⁰⁶ Cf. statement made by Irene Ximenes-Lopes-Miranda during the public hearing held before the Inter-American Court on November 30, 2005, *supra* note 38; and report prepared by psychiatrist Lidia Días-Costa, at the request of Irene Ximenes-Lopes-Miranda, submitted on December 14, 2002, *supra* note 38.

a) Regarding the violation of the right to life:

i. the State failed to comply with its duty to preserve and protect the life of Mr. Damião Ximenes-Lopes, as it did not adopt the necessary measures to prevent his death, nor did it control or supervise the operation of the *Casa de Reposo Guararapes*, and

ii. the failure to conduct a serious and effective investigation about the facts and to punish the persons liable for the death of the alleged victim is a violation by the State of its duty to guarantee the right to life.

b) Regarding the violation of the right to humane treatment, Mr. Damião Ximenes-Lopes was subjected to cruel, inhuman, and degrading treatment at the *Casa de Reposo Guararapes*. Violence against Mr. Ximenes-Lopes was inflicted by the persons who were in charge of his custody, and who were expected to take care of him, and preserve his health and personal integrity. The hospitalization conditions and the care given by such institution authorized by Brazil Single Health System (SUS) constituted in and of themselves an offense to the right to humane treatment.

c) Regarding acquiescence, the representatives pointed out that the State has violated four duties thereof concerning the patients admitted to the *Casa de Reposo Guararapes*: a) to prevent non-natural harm; b) to investigate the operating conditions of such mental health institution and to keep itself informed about them; c) to monitor and control the conduct of State officials, and d) not to cause, either as a result of willful or negligent acts, the death of the patients who were in its custody.

Arguments of the State

115. The State claimed, *inter alia*, that it acknowledges its international liability for the violation of Articles 4 and 5 of the American Convention, as a proof of its commitment with the protection of human rights.

Considerations of the Court

116. Article 1(1) of the American Convention provides that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

117. Subparagraph 1 of Article 4 of the American Convention provides that:

[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

118. Article 5 of the American Convention provides that:

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated regarding for the inherent dignity of the human person.

[...]

119. The Court reaffirms that the acknowledgment of liability made by the State regarding the violation of Articles 4 and 5 of the Convention to the prejudice of Mr. Damião Ximenes-Lopes is a positive contribution to the outcome of the instant case and is of the utmost importance for the effectiveness of the principles upheld by the American Convention¹⁰⁷ as to the State.

120. The Court finds it proven that in the *Casa de Reposo Guararapes* there was a context of violence against the patients admitted there, who were under the constant threat of being directly attacked by the officials in charge of the institution, or of their failure to prevent violence among patients, since employees were not commonly trained to work with persons with mental illness. The patients were also subjected to violence when they were in a critical health condition, since the physical containment and control techniques applied to patients when they were in crisis was frequently imposed with the help of other patients. Notwithstanding, violence was not the only obstacle to the recovery of patients at the *Casa de Reposo Guararapes*, since the precarious maintenance, preservation, and sanitation conditions, as well as of those in which health care services were provided, were also an offense to the dignity of the patients admitted there. Food storage as well as health and sanitation conditions at the *Casa de Reposo Guararapes* were quite poor; toilets were damaged and there were no showers, washbasins or waste disposal recipients and water toilets were dirty and had no cover; there was no physician among the staff of the institution, health care was usually given to patients at the entrance hall of the institution and sometimes there were no medicines; the emergency room lacked essential equipment such as oxygen bottles, "secretion aspirator" and vaporizers; medical records had no entry of the evolution of patients or of the detailed follow-up reports which were to be made by social workers, psychologists, occupational therapists, and nurses; and the owner of the institution was rarely there, whereby its mismanagement was evident. In sum, and according to what was pointed out by the Administrative Investigation Commission set up after the death of Mr. Damião Ximenes-Lopes, the *Casa de Reposo Guararapes* "did not compl[y] with the required conditions and [was] incompatible with the ethical and professional exercise of Medicine" (*supra* paras. 112(56), 112(57), 112(61), 112(63), 112(64) and 112(65)).

121. The Courts finds it proven that at the moment Ms. Albertina Viana-Lopes went to the *Casa de Reposo Guararapes* on October 4, 1999, Mr. Damião Ximenes-Lopes was bleeding and had bruises all over his body, his clothes were torn, he was dirty and reeking of feces and urine, his hands were tied at the back, and he was breathing with difficulty, in the throes of death, screaming and asking for help to the

¹⁰⁷ Cf. *Case of Baldeón-García*, *supra* note 4, para. 55; *Case of Blanco-Romero et al*, *supra* note 20, para. 100; and *Case of García-Asto and Ramírez-Rojas*, *supra* note 20, para. 60.

police. Later, Mr. Damião Ximenes-Lopes was bathed and while he was still with his hands tied, he fell off the bed. The alleged victim was left lying on the floor, was given medication and later died, while no attending physician was there. The autopsy revealed that his body showed localized flaying on the nose, right shoulder, the front part of the knees and the left foot and localized echimosis in the region of the left eye, homolateral shoulder and hands, whereby the Court finds it proven that the death occurred in violent circumstances (*supra* paras. 112(9), 112(10), 112(11), and 112(14)).

122. In its partial acknowledgment of international liability, the State acknowledged the facts alleged in the complaint regarding the death of Mr. Damião Ximenes-Lopes, and the lack of prevention necessary to overcome the conditions that allowed such event to happen, as well as the then precarious conditions of the mental health care system to which the alleged victim was subjected, which amounted to the violation of Article 4 of the Convention. The State further acknowledged the mistreatment suffered by Mr. Ximenes-Lopes before his death, which resulted in the violation of Article 5 of the Convention (*supra* paras. 36, 63, and 66).

123. Notwithstanding, the Court finds it relevant to examine certain aspects regarding the violation of the rights enshrined in Articles 4 and 5 of the Convention in the instant case, since this is the first time that the Court has had the opportunity to issue a ruling on the violation of the rights of a person with mental illness. The Court will analyze this issue from two perspectives: A) the rights of persons with mental illness, and B) the duties of the State regarding such persons.

A) The rights of persons with mental illness

1. The right to life and to humane treatment

124. The Court has repeatedly held that the right to life is an essential human right, whose enjoyment is a prerequisite for the exercise of all other human rights. Due to the essential nature of the right to life, no restrictive approaches thereto¹⁰⁸ are to be admitted.

125. By virtue of the fundamental role ascribed to the right to life by the Convention, the Court has argued in its case law that the States have the duty to ensure the creation of the conditions required to prevent the violations of this inalienable right, and particularly, the duty to prevent their agents from infringing

¹⁰⁸ Cf. *Case of Baldeón-García*, *supra* note 4, paras. 82 and 83; *Case of the Sawhoyamaya Indigenous Community*, *supra* note 4, paras. 150, 151 and 152; *Case of the Pueblo Bello Massacre*, *supra* note 25, paras. 119 and 120; *Case of the Mampiripán Massacre*, *supra* note 21, para. 232; *Case of the Indigenous Community Yakye Axa*, *supra* note 30, paras. 161 and 162; *Case of Huilca Tecse*. Judgment of March 3, 2005. Series C No. 121, paras. 65 and 66; *Case of the "Juvenile Reeducation Institute"*. Judgment of September 2, 2004. Series C No. 112, paras. 156 and 158; *Case of the Gómez-Paquiyaury Brothers*. Judgment of July 8, 2004. Series C No. 110, paras. 128 and 129; *Case of 19 Tradesmen*. Judgment of July 5, 2004. Series C No. 109, para. 153; *Case of Myrna Mack Chang*. Judgment of November 25, 2003. Series C No. 101, paras. 152 and 153; *Case of Juan Humberto Sánchez*, *supra* note 30, para. 110; and *Case of the "Street Children" (Villagrán-Morales et al)*. Judgment of November 19, 1999. Series C No. 63, para. 144.

it.¹⁰⁹ In essence, Article 4 of the Convention guarantees not only the right of every human person not to be deprived of his life arbitrarily, but also, the duty of the States to adopt such measures as may be necessary to create a legal framework which allows deterring any threat to the right to life; to establish an effective system of justice which can investigate, punish, and redress any act of deprivation of life by the State agents or private individuals; and to safeguard the right to have access to the conditions which guarantee a decent life, which includes the adoption of positive measures which prevent the violation of this right.¹¹⁰

126. For its part, the American Convention expressly recognizes the right to humane treatment, a legal right whose protection entails the fundamental purpose of imperatively prohibiting torture and cruel, inhuman, or degrading punishment or treatment. Pursuant to the Court case law, at present such prohibition belongs to the *ius cogens* domain.¹¹¹ Under no circumstance can the right to humane treatment be suspended.¹¹²

127. The Court has already established that “[the] infringement of the right to physical and psychological integrity of the human person is a type of violation which has a varying connotation and which encompasses torture and other types of mistreatment or cruel, inhuman, or degrading treatment whose physical and psychological consequences may have different degrees of intensity according to the extrinsic and intrinsic factors which should be proved in each specific situation.”¹¹³ That is, the personal features of an alleged victim of torture or cruel, inhuman, or degrading treatment should be taken into consideration when determining whether

¹⁰⁹ Cf. *Case of Baldeón-García*, supra note 4, para. 83; *Case of the Sawhoyamaya Indigenous Community*, supra note 4, para. 151; *Case of the Pueblo Bello Massacre*, supra note 25, para. 120; *Case of Huilca Tecse*, supra note 108, para. 65; *Case of the “Juvenile Reeducation Institute”*, supra note 108, para. 156; *Case of the Gómez-Paquiyaui Brothers*, supra note 108, para. 128; *Case of 19 Tradersmen*, supra note 108, para. 153; *Case of Myrna Mack Chang*, supra note 108, para. 152; *Case of Juan Humberto Sánchez*, supra note 30, para. 110; and *Case of the “Street Children” (Villagrán-Morales et al)*, supra note 108, para. 144.

¹¹⁰ Cf. *Case of Baldeón-García*, supra note 4, para. 85; *Case of the Sawhoyamaya Indigenous Community*, supra note 4, para. 153; *Case of the Pueblo Bello Massacre*, supra note 25, para. 120; *Case of the Mapiripán Massacre*, supra note 21, para. 232; *Case of the Indigenous Community Yakye Axa*, supra note 30, para. 162; *Case of Huilca Tecse*, supra note 108, para. 66; *Case of the “Juvenile Reeducation Institute”*, supra note 108, para.158; *Case of the Gómez-Paquiyaui Brothers*, supra note 108, para. 129; *Case of 19 Tradersmen*, supra note 108, para. 153; *Case of Myrna Mack Chang*, supra note 108, para. 153; *Case of Juan Humberto Sánchez*, supra note 30, para. 110; and *Case of the “Street Children” (Villagrán-Morales et al)*, supra note 108, para. 144.

¹¹¹ Cf. *Case of Baldeón-García*, supra note 4, para. 117; *Case of García-Asto and Ramírez-Rojas*, supra note 20, para. 222; *Case of Fermín-Ramírez*. Judgment of June 20, 2005. Series C No 126, para. 117; *Case of Caesar*. Judgment of March 11, 2005. Series C No. 123, para. 59; *Case of Lori Berenson-Mejía*, supra note 24, para. 100; *Case of De la Cruz-Flores*. Judgment of November 18, 2004. Series C No. 115, para. 125; *Case of Tibi*. Judgment of September 7, 2004. Series C No. 114, para. 143; *Case of the Gómez-Paquiyaui Brothers*, supra note 108, paras. 111 and 112; *Case of Maritza Urrutia*. Judgment of November 27, 2003. Series C No. 103, paras. 89 and 92; *Case of Bámaca-Velásquez*. Judgment of November 25, 2000, Series C No. 70, para. 154; and *Case of Cantoral-Benavides*. Judgment of August 18, 2000. Series C No. 69, para. 95.

¹¹² Cf. Articles 5 and 27 of the American Convention. See in this regard, *Case of the Pueblo Bello Massacre*, supra note 25, para. 119; and *Case of the “Juvenile Reeducation Institute”*, supra note 108, para. 157.

¹¹³ Cf. *Case of Caesar*, supra note 111, para. 69; and *Case of Loayza-Tamayo*. Judgment of September 17, 1997. Series C No. 33, para. 57.

his or her personal integrity has been violated, for such features may change the insight of his or her individual reality and, therefore, increase the suffering and the sense of humiliation when the person is subjected to certain types of treatment.

2. The right to the respect for the dignity and autonomy of the persons with mental illness and to effective health care

128. The States have the duty to guarantee the provision of effective health care services to all persons with mental illness.¹¹⁴ This duty entails the obligation of the State to ensure the access to basic health care to all persons, the promotion of mental health, the provision of such services in the least restrictive possible way, and the prevention of mental illness.¹¹⁵

129. Due to their psychological and emotional condition, persons with mental illness are particularly vulnerable to any health treatment, and such vulnerability is greater when they are admitted to mental health institutions. This increased vulnerability is due to the imbalance of power between patients and the medical staff responsible for their treatment, as well as to the high degree of intimacy which is typical of the treatment of psychiatric illnesses.¹¹⁶

130. The Court considers that any health treatment administered to persons with mental illness should aim at achieving the patient's welfare and the respect for his or her dignity as a human person, which is translated into the duty to adopt the respect for the intimacy and autonomy of persons as guiding principles for administering psychiatric treatment. The Court concedes that the foregoing principle is not absolute, since the patients' needs themselves may sometimes require the adoption of measures without their consent. Notwithstanding, mental illnesses should not be understood as a disability for determination and the assumption that persons with mental illness are capable of expressing their will, which should be respected by both the medical staff and the authorities, should prevail. When the patients' inability to give their consent has been proven, their next of kin, legal representatives or pertinent authorities will give the consent required as regards to the treatment to be administered thereto.¹¹⁷

¹¹⁴ Cf. Principles for the Protection of People with Mental Health Illness and the Improvement of Health Care, *supra* note 32, principle 1; Division of Mental Health and Prevention of Substance Abuse of the World Health Organization. Ten Basic Principles of Mental Health Care Law, *supra* note 37, principle 2; Standard Rules on the Equalization of Opportunities for Persons with Disabilities. UN General Assembly Resolution No. 48/96, Document A/48/49 (1993), art. 2; Declaration on the Rights of Mentally Retarded Persons. UN General Assembly Resolution, Document A/8429 (1971), art. 2; and World Program of Action Concerning Disabled People. UN General Assembly Resolution No. 37/52, Document A/37/51 (1982), paras. 95 to 107.

¹¹⁵ Cf. Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, *supra* note. 35, Article III(2); and World Health Organization. Division of Mental Health and Prevention of Substance Abuse. Ten Basic Principles of Mental Health Care Law, *supra* note 37, principles 1, 2, and 4.

¹¹⁶ Cf. Standard Rules on the Equalization of Opportunities for Persons with Disabilities, *supra* note 114, art. 9(4); Committee on Economic, Social, and Cultural Rights, General Comment No. 5 "Persons with Disabilities", *supra* note 35, para. 9; and Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf/E (2002) 1 - Rev. 2004, para. 51. In this regard, cf. European Court of Human Rights, *Keenan v. United Kingdom*, Application No. 27229/95, judgment of April 3, 2001, p. 111, and European Court of Human Rights, *Herczegfalvy v. Austria*, Application No. 10533/83, judgment of September 24, 1992, p. 82.

¹¹⁷ Cf. Principles for the Protection of People with Mental Illness and the Improvement of Health Care, *supra* note 32, principles 9(4) and 11; Division of Mental Health and Prevention of Substance Abuse

i) Basic care and decent hospitalization conditions

131. The Principles for the Protection of People with Mental Health Illness and the Improvement of Health Care published by the United Nations offer useful guidelines for determining whether medical care has been in keeping with the minimum requirements to preserve the patient's dignity. Principles 1, 8 and 9 of the above mentioned decalogue set forth the fundamental freedoms and rights and the standards regarding the medical care and treatment to be provided to persons with mental illness. Furthermore, the facilities and physical conditions in which treatment is administered should be in accordance with the respect for the dignity of the person, pursuant to Principle 13.

132. The Court considers that the precarious operating conditions of *Casa de Reposo Guararapes*, both regarding the general conditions of the place and the medical care provided therein, were quite far from being adequate to administer a decent health treatment and were in and of themselves incompatible with the appropriate protection of personal integrity and life, particularly as they affected persons who were extremely vulnerable due to their mental illness.

ii) The use of restraint

133. Restraint is understood as any action which interferes with the ability of a patient to take decisions or which restricts his or her freedom of movement. The Court notes that the use of restraint poses a high risk of doing harm to the patient or causing his or her death and that falls and lesions during such procedure are quite common.¹¹⁸

134. The Court considers that restraint is one of the most aggressive measures to which a patient under psychiatric treatment can be subjected. In order for restraint to be in accordance with the respect for the psychological, physical, and moral integrity of a person, pursuant to the standards required by Article 5 of the American Convention, it should be used as a last resort and with the only purpose of protecting the patient, or else the medical staff or third persons, when the behavior of the patient involved is such as to pose a threat to their safety. Restraint can have no purpose other than the foregoing, and should be implemented only by qualified staff rather than by patients.¹¹⁹

of the World Health Organization. Ten Basic Principles of Mental Health Care Law, *supra* note 37, principles 5, 6 and 9; Pan American Health Organization, Caracas Declaration, adopted by the Conference on the Modernization of Mental Health Legislation in Latin America on November 14, 1990, art. 3; World Psychiatric Association (WPA), Madrid Declaration on Ethical Standards for Psychiatric Practice, approved by WPA General Assembly Resolution of August 25, 1996, as revised on August 26, 2002, preamble and para. 4; and World Psychiatric Association (WPA), Declaration of Hawaii/II, adopted by the WPA General Assembly on July 10, 1983, p. 2 and 5.

¹¹⁸ Cf. Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf/E (2002) 1 – Rev. 2004. Extract from the Eighth General Report CPT/INF(98) 12, paras. 47 to 49; American Hospital Association/National Association of Psychiatric Health Systems, Guiding Principles on Restraint and Seclusion for Behavioral Health Services, 25 February 1999; American Geriatrics Society Position Statement: Guidelines For Restraint Use, Last Updated January 1, 1997; and American Medical Association, Guidelines for the Use of Restraints in Long-Term Care Facilities, June 1989, p. 5.

¹¹⁹ Cf. Principles for the Protection of People with Mental Illness and the Improvement of Health Care, *supra* note 32, principle 11(11).

135. Furthermore, and bearing in mind that any treatment should be chosen on the basis of the patient's best interest and the respect for his or her autonomy, health care staff should apply the least restrictive possible restraint techniques and only for such period of time as it is absolutely necessary and under conditions which respect the patient's dignity and minimize the risks of impairing his or her health.¹²⁰

136. The hands of Mr. Damião Ximenes-Lopes were tied at the back between Sunday evening and Monday morning, though the need to continue implementing containment procedures had not been reassessed, and he was allowed to walk without proper supervision. This kind of physical restraint to which the alleged victim was subjected is not consistent with the need to provide the patient with a decent treatment, nor does it protect his psychological, physical or moral integrity.

B) Duties of the State regarding persons with mental illness

137. The Court has already pointed out that from the generic obligation to ensure the rights to life and humane treatment, special duties of protection and prevention are derived, which, in the instant case, entail the duties to take care and regulate.

1. The duty to take care

138. In order to determine the duties of the State regarding persons with mental illness, the Court deems it necessary to bear in mind, firstly, the special position as guarantor the State has in regard to the persons who are in its custody or under its care and with whom the State has the positive duty to provide the necessary conditions to lead a decent life.¹²¹

139. Secondly, the Court considers that the foregoing is particularly true of persons who are under health treatment, since the ultimate purpose of the provision of health services is the improvement of the patient's physical or mental condition, which significantly increases the duties of the State and requires it to adopt such measures as are available and necessary to prevent the impairment of the patient's condition as well as to optimize his or her health.

¹²⁰ Cf. Principles for the Protection of People with Mental Illness and the Improvement of Health Care, *supra* note 32, principle 11(11); Madrid Declaration on Ethical Standards for Psychiatric Practice, *supra* note 117, preamble; Division of Mental Health and Prevention of Substance Abuse of the World Health Organization. Ten Basic Principles of Mental Health Care Law, *supra* note 37, principle 4(3); and Declaration of Hawaii/II, adopted by the WPA General Assembly on July, 10 1983, *supra* note 117, p. 1.

¹²¹ Cf. *Case of Baldeón-García*, *supra* note 4, para. 120; *Case of López-Álvarez*. Judgment of February 1, 2006. Series C No. 141, paras. 104 to 106; *Case of García-Asto and Ramírez-Rojas*, *supra* note 20, para. 221; *Case of the Indigenous Community Yakye Axa*, *supra* note 30, para. 162, *Case of Lori Berenson-Mejía*, *supra* note 24, para. 102; *Case of Tibi*, *supra* note 111, para. 150; *Case of the "Juvenile Reeducation Institute"*, *supra* note 108, para. 152; *Case of the Gómez-Paquiyaui Brothers*, *supra* note 108, para. 98; *Case of Bulacio*. Judgment of September 18, 2003. Series C No. 100, para. 138, and *Case of Juan Humberto Sánchez*, *supra* note 30, para. 111. In this regard, *Case of the Urso Branco Prison*. Provisional Measures. Order of the Inter-American Court of Human Rights of September 21, 2005, Considering Sixth; and *Case of the Gómez-Paquiyaui Brothers*. Provisional Measures. Order of the Inter-American Court of Human Rights of May 7, 2004, Considering Thirteenth.

140. Finally, the care every person who is under health treatment is entitled to is particularly required in the case of patients with mental illness, given their vulnerability when they are admitted to psychiatric institutions.

2. *The duty to regulate and supervise*

141. The Court has established that the duty of the States to regulate and supervise the institutions which provide health care services, as a necessary measure aimed at the due protection of the life and integrity of the individuals under their jurisdiction, includes both public and private institutions which provide public health care services, as well as those institutions which provide only private health care (*supra* paras. 89 and 90). Particularly, regarding the institutions which provide public health care services, such as the *Casa de Reposo Guararapes*, the State should not only regulate and supervise them, but also take care of the persons admitted to such institutions.

142. In the instant case, the *Casa de Reposo Guararapes* operated within the framework of the public health care system, and the State had the duty to regulate and supervise it, not only by virtue of the duties thereof derived from the American Convention, but also by reason of its domestic legislation. Pursuant to Article 197 of the Constitution, "health care services are of public relevance, and it is incumbent upon the power of the State to provide for their regulation, supervision, and control, pursuant to the legislation in force [...]." Furthermore, Article 200 of the Constitution sets forth that "the [S]ingle [H]ealth [S]ystem [...] has the duty to control and supervise procedures [... and] implement health surveillance policies [...]." In turn, Article 6 of Law No. 8,080 of 1990 provides that "the scope of action of the Single Health System (SUS), includes [*inter alia*,] the adoption of measures to implement health surveillance, [which] is understood as a set of policies aimed at preventing health risks and taking action regarding health problems [...] related to the performance of health care services [and] the control and monitoring of relevant health services, products, and substances [...]."

143. The Court notes that the State was cognizant of the hospitalization conditions of the *Casa de Reposo Guararapes* at the time of the facts. The violence inflicted on patients had already been the context of the death of two persons admitted to such institution (*supra* para. 112(58)). Furthermore, on May 15, 1996 the Psychiatric Care Support Group of the Ministry of Health had drawn a report on the results of the inspection carried out at the *Casa de Reposo Guararapes*, wherein it was recommended that two infirmaries of said institution be closed due to their poor operating conditions, leaks, and other irregularities (*supra* para. 112(62)).

144. The Court points out that this situation continued until October 21, 1999, when officials from the Department of Health Surveillance of the Secretariat of Health and Social Development carried out an inspection at the *Casa de Reposo Guararapes* in order to find out if such institution complied with the provisions of the pertinent regulations. Furthermore, on November 4, 1999 the Coordinator of Control, Evaluation, and Audit and the Medical Auditor of the Municipal Audit System, visited the *Casa de Reposo Guararapes*. In full agreement, the three bodies concluded that the institution did not meet the requirements set forth in the pertinent regulations and recommended that the irregularities be immediately sorted out (*supra* paras. 112(63) and 112(64)).

145. Though the contentious jurisdiction of the Court was recognized by the State on December 10, 1998, the Court considers that the period of ten months and eleven days from such date to October 21, 1999, during which no measures were taken to improve the precarious health care conditions at the *Casa de Reposo Guararapes*, is not compatible with the duty of the State to regulate health care services which are provided to the individuals under the jurisdiction thereof, as irregularities had been reported since May 15, 1996.

146. The State has international liability in the instant case due to its failure to take care and prevent the breach of the right to life and humane treatment, as well as of its duty to regulate and monitor health care services, which are special duties derived from its obligation to guarantee the rights enshrined in Articles 4 and 5 of the American Convention.

3. *The duty to investigate*

147. The duty to guarantee the human rights enshrined in the Convention is not limited to the existence of a legal system designed to allow the fulfillment of such duty, but also entails the need to adopt government policies which ensure the effective guarantee for the free and full exercise of human rights.¹²² In this regard, one of the conditions to effectively guarantee the right to life and personal integrity is the compliance with the duty to investigate the violation of such rights, which is derived from Article 1(1) of the Convention, in conjunction with the substantive right which should be preserved, protected or guaranteed.¹²³

148. In view of the foregoing, the State has the duty to commence *ex officio* and without delay, a serious, fair, and effective investigation which is not undertaken as a mere formality condemned in advance to be fruitless.¹²⁴ Such investigation should be carried out with all available means and should be designed to establish the truth and to investigate, prosecute, and punish all the persons who are liable for the facts, particularly when State officials are or may be involved.¹²⁵

149. In order to establish whether the duty to protect the rights to life and humane treatment by means of a serious investigation about the facts has been effectively complied with, it is necessary to examine the domestic proceedings instituted in order to elucidate the facts, which will be done in Chapter X of this Judgment.

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150. The foregoing considerations have led the Court to conclude that, due to its failure to comply with the duties of respect, prevention, and protection regarding the

¹²² Cf. *Case of the Sawhoyamaya Indigenous Community*, *supra* note 4, para. 167; and *Case of the Pueblo Bello Massacre*, *supra* note 25, para. 142.

¹²³ Cf. *Case of Baldeón-García*, *supra* note 4, para. 92; *Case of the Pueblo Bello Massacre*, *supra* note 25, para. 142; and *Case of the Mapiripán Massacre*, *supra* note 21, para. 233.

¹²⁴ Cf. *Case of Baldeón-García*, *supra* note 4, paras. 92 and 93; *Case of the Pueblo Bello Massacre*, *supra* note 25, para. 143; and *Case of the Mapiripán Massacre*, *supra* note 21, paras. 219 and 223.

¹²⁵ Cf. *Case of Baldeón-García*, *supra* note 4, para. 94; *Case of Pueblo Bello Massacre*, *supra* note 25, para. 143; and *Case of the Moiwana Community*. Judgment of June 15, 2005. Series C No. 124, para. 203.

death and cruel, inhuman, and degrading treatment suffered by Mr. Damião Ximenes-Lopes, the State is liable for the violation of the rights to life and humane treatment enshrined in Articles 4(1), 5(1) and 5(2) of the Convention, in relation to Article 1(1) thereof, to the prejudice of Mr. Damião Ximenes-Lopes.

IX
VIOLATION OF ARTICLE 5 OF THE AMERICAN CONVENTION
IN RELATION TO ARTICLE 1(1) THEREOF
(Right to Humane Treatment and Obligation to Respect Rights)

151. In their closing arguments, the representatives alleged that the next of kin of Mr. Damião Ximenes-Lopes are alleged victims of Article 5 of the American Convention, in relation to Article (1)1 thereof, on the grounds of the facts set forth in the complaint regarding the death of Mr. Ximenes-Lopes, and which were accepted by the State in its acknowledgement of liability. Therefore, they consider that the State should duly redress the next of kin of Mr. Damião Ximenes-Lopes for such violation.

152. Neither the Commission nor the State have filed any arguments on the above mentioned violation of Article 5 of the Convention, in relation to the next of kin of Mr. Damião Ximenes-Lopes.

Considerations of the Court:

153. Article 1(1) of the American Convention provides that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

154. Article 5 of the American Convention provides that:

1. Every person has the right to have his physical, mental, and moral integrity respected.

[...]

155. As to the alleged violation of Article 5 of the American Convention, which was stated only in the closing arguments filed by the representatives but not included in the brief containing motions and pleadings, the Court considers such arguments to be time-barred; notwithstanding, pursuant to the principle of *iuria novit curia*¹²⁶ the Court is not hindered from examining it.

156. The Court has repeatedly¹²⁷ pointed out that the next of kin of the victims of violations of human rights may be, in turn, victims themselves. The Court considers

¹²⁶ Cf. *Case of the Girls Yean and Bosico*. Judgment of September 8, 2005. Series C No 130, para. 204; *Case of Cantos*. Judgment of November 28, 2002. Series C No 97, para. 58; and *Case of Hilaire* Judgment of June 21, 2002. Series C No 94, para. 107.

¹²⁷ Cf. *Case of Baldeón-García*, *supra* note 4, para. 128; *Case of López-Álvarez*, *supra* note 121, para. 119; and *Case of the Pueblo Bello Massacre*, *supra* note 25, para. 154.

that the right to the psychological and moral integrity of the victims' next of kin has been violated as a result of the additional suffering they have endured due to the specific circumstances of the violations committed against their beloved persons and to the subsequent actions or failure to act by the State officials regarding such facts.¹²⁸

157. After examining the circumstances of the case, based on the American Convention, and in the light of the principle of *iura novit curia*, the Court deems the suffering endured by Ms. Albertina Viana-Lopes, mother of Mr. Damião Ximenes-Lopes, to be proven due to the treatment given to her son by the State, as a result of which her son died. It was she who left her son under the State custody at the *Casa de Reposo Guararapes* since he was ill and she expected that he would recover there. Notwithstanding, three days after his admission, she found him in extremely bad conditions, but was unable to do anything for him. She learnt about his death when she arrived home after leaving him in said institution. This made her very sad and caused her great pain. After her son's death, she has suffered from deep depression and health problems. In this regard, at the public hearing before the Court her daughter Irene Ximenes-Lopes-Miranda declared that:

[her mother] had her life completely ruined, she still suffers from depression and says she wants to die, she has lost the will to continue living, had nervous gastritis and, consequently, a duodenal ulcer which [...] was extremely hard to treat [...].

158. Likewise, in accordance with the specific characteristics of the case, the Court deems it necessary to examine the situation of Mr. Francisco Leopoldino Lopes, father of Mr. Damião Ximenes-Lopes, of Mrs. Irene Ximenes-Lopes-Miranda and of Mr. Cosme Ximenes-Lopes, sister and brother respectively of the alleged victim, since according to the arguments filed by the representatives and Mrs. Irene Ximenes-Lopes-Miranda, among the relatives of Mr. Damião Ximenes-Lopes, his mother and father, as well as the above mentioned sister and brother in particular, were the affectionately closest persons to him.

159. The Court deems to be proven that the victim's father, Mr. Francisco Leopoldino Lopes, who, though being separated from Mr. Damião Ximenes-Lopes' mother had not broken up the family ties with his son (*supra* para. 111(71)), endured suffering and distress. Mr. Francisco Leopoldino Lopes experienced suffering because of the death of his son, who was very young when he died, and according to the statements given by Mrs. Irene Ximenes-Lopes-Miranda before the Court, lived eager for revenge for a long time.

160. Besides the distress and sadness caused by her brother's death, his sister suffered psychological consequences, such as depression for over three years, which affected her relationship with the family and prevented her from breastfeeding her newly-born daughter. She further terminated an employment contract which was to expire on December 31, 2004. She has endured permanent suffering and has relived the circumstances of the death of her brother, Damião Ximenes-Lopes, before judicial and human rights bodies, since she committed herself to find out the truth and obtain justice concerning these facts, wherefore she has actively taken part in

¹²⁸ Cf. *Case of Baldeón-García*, *supra* note 4, paras. 128; *Case of López-Álvarez*, *supra* note 121, para. 119; and *Case of the Pueblo Bello Massacre*, *supra* note 25, para. 154.

the domestic judicial proceeding and in the steps taken before the Commission and, thereafter, before the Court. Due to the foregoing, she has had to stay away from her family for long periods.

161. The distress suffered by the sister of Mr. Ximenes-Lopes is evident in her statement, given at a public hearing before the Court, wherein she declared that:

The day of the burial [of] her brother at the cemetery [she] kneeled down over his coffin and swor[e] that [she] would not res[t] until justice were done in the case [of Damião Ximenes-Lopes], and [she] has [been] claiming for justice for six years [...].

162. Mr. Cosme Ximenes-Lopes, who was also admitted to mental health institutions, also suffered because of Mr. Damião Ximenes-Lopes' death, given their mutual love and the identification they had with each other as they were twins. After he was informed of his brother's death, he got into a shock; later on, he suffered from depression and quit his job.

163. By virtue of the foregoing, the Court considers that the State is liable for the violation of the right to personal integrity enshrined in Article 5 of the American Convention in relation to Article 1(1) thereof, to the prejudice of Ms. Albertina Viana-Lopes and Mrs. Irene Ximenes-Lopes-Miranda and Mr. Francisco Leopoldino Lopes and Mr. Cosme Ximenes-Lopes.

X
VIOLATION OF ARTICLES 8(1) AND 25(1) OF THE AMERICAN CONVENTION
IN RELATION WITH ARTICLE 1(1) THEREOF
(Right to a Fair Trial, Judicial Protection, and
the Obligation to Respect Rights)

Arguments of the Commission

164. In relation with the alleged violation of Articles 8(1) and 25(1) of the Convention to the detriment of the relatives of Mr. Damião Ximenes-Lopez, the Inter-American Commission argued, *inter alia*, that:

- a) in the instant case, the lack of effectiveness of the domestic process may be proved in two ways: by reason of the failure of the authorities to take steps and undertake essential inquiries to establish the truth, and as a result of flaws and failures in the steps actually taken;
- (b) the flaws in the investigation show that the State authorities did not seek to discover the truth about the death of the alleged victim through an immediate, serious and thorough investigation;
- c) police authorities learnt about the death of the alleged victim from his relatives on the same day. However, the Sobral police chief did not start the police investigation until on November 9, 1999, 35 days later. According to the Commission, such delay had a significant impact on the efficiency of the investigation.
- d) The Attorney General's Office filed the complaint on March 27, 2000, describing the killing of Damião Ximenes-Lopes by blows as a death brought on by a lack of essential care and, alternatively, it concluded that even if the death had been caused by blows, section 136 of the Criminal Code would still be the applicable provision;

- e) in the instant case, the procedural steps taken by the alleged victim's relatives are not relevant for analyzing the reasonable time. As a result, the State's assertions that the deficiencies in the investigation and in the production of evidence could have been cured by Mr. Damião Ximenes-Lopes' mother in his capacity as civil complainant in the criminal action No. 674/00, are groundless;
- f) the instant case may not be considered to be complex, as alleged by the State, on the grounds of the allegedly large number of testimonies. The negligent and unjustified conduct of the government authorities caused the delay in the domestic proceedings, since they took a long time to start the investigations, hold and appear at hearings, issue writs, warrants and requests.. The authorities confined themselves to issuing interlocutory orders without cause, and for months no decision or order was issued. The workload of the Third Chamber of the Trial Court in and for Sobral is no excuse for the State's delay and inertia, and
- g) the lack of a first instance judgment after six years of Mr. Damião Ximenes-Lopes' death, together with the current status of the domestic criminal proceeding, which is still in the preliminary stage, indicate that the next of kin of the alleged victim are going through a situation of justice denial by the government authorities.

Arguments of the Representatives

165. In relation with the alleged violation of Articles 8(1) and 25(1) of the Convention to the detriment of the relatives of Mr. Damião Ximenes-Lopes, the Inter-American Commission argued, *inter alia*, that:

- a) the police investigation is tainted with a number of irregularities which compromise the inquiries into Damião Ximenes-Lopes' death. The competent authorities overlooked material evidence and testimony from eyewitnesses that prove that the death of Mr. Ximenes-Lopez was the result of blows. Among the flaws are the statement that the death of the victim was due to "undetermined reasons;" the deficiency of the autopsy report, which raises suspicion over the independence of the investigation; and the disappearance of key evidence incriminating the managers of the *Casa de Reposo de Guararapes* (Guararapes Rest Home);
- (b) six years after Mr. Damião Ximenes-Lopes' death, no person or institution has been held responsible, as no judicial decision has been rendered yet;
- c) while the inertia in prosecuting the perpetrators of Mr. Damião Ximenes-Lopes' death persists, the State will be breaching its obligation to effectively punish human rights violations within a reasonable time;
- d) the case at hand has no particular trait that renders it particularly complex. It is worth noting that the events have been looked into by several entities and individuals, producing a large amount of documentary and testimonial evidence; the witnesses and the accused are alive and have been located, and there is no impediment save for the lack of effort by the authorities to prosecute the perpetrators.
- e) as regards to the participation of the interested parties in the proceedings, the next of kin of Mr. Damião Ximenes-Lopes made every effort to cooperate with the Government investigators and pursue the case. In this

connection, they have taken innumerable steps to further the police investigation and the criminal prosecution for the death of the alleged victim;

f) The ability of the relatives under Brazilian law to actively participate and cooperate in the course of the proceedings as a civil complainant in a criminal case may not be construed as a substitute for the State's responsibility to conduct a thorough and unbiased investigation within a reasonable time as part of the legal remedy safeguard;

g) the actions of state agents have hindered the prosecutions of the perpetrators;

h. under the Code of Criminal Procedure, a criminal action must commence and terminate within 81 days. The instant case has spanned over 2,200 days, more than twenty-eight times the length set forth in such code, and

I. the next of kin of the alleged victim, in particular his sister Irene Ximenes-Lopes-Miranda, have gone through great lengths to cooperate and further the proceedings. As a result of the undue delay, attributed exclusively to the State, Mr. "Damião [Ximenes-Lopes] and his family [have been] denied their rights under Articles 8 and 25 of the American Convention."

Arguments of the State

166. In relation with the alleged violation of Articles 8(1) and 25(1) of the Convention to the detriment of the relatives of Mr. Damião Ximenes-Lopes, the State argued, *inter alia*, that:

a) the State's commitment to the pursuit of justice was evidenced in the preliminary stage of the proceedings, and in the statement of the facts and arguments presented in the answer to the complaint, which describes all the measures adopted by the State to investigate the circumstances surrounding the death of Mr. Damião Ximenes-Lopes and punish those responsible for the ill treatment and death of that patient of the *Casa de Reposo Guararapes* (Residential Rest Home);

(b) the State adopted all measures needed to impose criminal sanctions on those responsible for the death of Mr. Damião Ximenes-Lopes. However, it must not be overlooked that in the criminal proceeding, the fundamental safeguards of the accused must also be observed;

c) as regards to the actual investigation, it is improper to talk about a violation on the part of the State. The investigative, prosecutorial, defensive and adjudicatory functions are exercised by separate and independent organs. The subsequent lack of evidence in the police investigation produced no harm whatsoever, as it could be cured during trial. In the instant case, the evidence tendered was sufficient to satisfy the Attorney General that the crime has been committed and that there is evidence of who committed it.

d) in the instant case, the preliminary stage of the criminal proceedings have been concluded, and the judgment is due for the first months of 2006, and

e) the State did not infringe Articles 8 and 25 of the Convention, inasmuch as the investigations into the death of Damião Ximenes-Lopes have complied with the legal requirements, and have observed the due process of law, the right of rebuttal and the right to defense. The delay in the criminal proceeding is reasonable, since it is due to the search for the real truth, the complexity of the case and the peculiarities of Brazilian criminal procedure.

The Court's Assessment

167. Article 1(1) of the American Convention provides that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

168. Article 8(1) of the American Convention provides that:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

[...]

169. Article 25 of the American Convention provides that:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

[...]

170. In the instant case, the Commission and the representatives alleged that Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention in relation with Article 1(1) thereof have been violated to the detriment of the relatives of the alleged victim, based on the fact that the criminal action filed in order to investigate, identify and punish those responsible for the ill treatment and death of Mr. Damião Ximenes-Lopes is still pending, six years after the events took place, and no decision has been rendered by the trial court (*supra* para. 112(43)). Moreover, the civil action for damages has not been adjudicated either (*supra* para. 112(49)). Therefore, the Court deems it necessary to look into the proceedings in connection with the police investigation and the criminal action and the civil action for damages that are currently pending before the domestic courts. Such inquiry must be carried out pursuant to Articles 8 and 25 of the American Convention, in relation with the relatives of the alleged victim.

171. The Court must determine whether the proceedings have been conducted observing the judicial protection requirements and within a reasonable time, and whether they have provided an effective recourse to guarantee the rights to justice, the knowledge of the truth and reparations to the relatives.

172. It is worth noting that it is a basic principle of the law governing the international liability of States, endorsed by the International Law of Human Rights, that every State is internationally responsible for acts or omissions by any of its branches or agencies in violation of the internationally recognized rights, pursuant to Article 1(1) of the American Convention.¹²⁹¹²⁹

¹²⁹ Cf. *Case of Baldeón-García*, *supra* note 4, para. 140; *Case of Pueblo Bello Massacre*, *supra* note 25, para. 111 and 112; and *Case of Mapiripan Massacre*, *supra* note 21, para. 108

173. Articles 8 and 25 of the Convention establish the scope of the above-mentioned principle of responsibility for the acts of any State organ in connection with the acts and omissions of judicial authorities.¹³⁰

174. In similar cases, this Court has held that the clarification of alleged failures by the State through its judicial authorities to comply with its international obligations may lead the Court to examine the domestic proceedings. In light of the foregoing, domestic proceedings must be regarded as a whole, as the function of the international tribunal is to determine whether the entirety of the proceedings was conducted pursuant to the rules of international law.¹³¹

175. In making such analysis, the Court considers that, under the American Convention, the Status Parties must afford effective judicial remedies to the victims of human rights violations (Article 25), which must be substantiated pursuant to the rules of the due process of law (Article 8(1)), notwithstanding the general obligation of the States to guarantee the free and full exercise of the rights of all persons under their jurisdiction pursuant to the Convention (Article 1(1)).¹³²

176. We conclude from the analysis of the facts of the instant case that Albertina Viana-Lopes and Irene Ximenes-Lopes-Miranda were who took steps for commencing, accompanied, and intervened in, the proceedings aimed at knowing the fate of Mr. Damião Ximenes-Lopes. Therefore, the Court will now analyze whether the State afforded them effective recourse.

A) *Police Investigation and Proceedings Related to the Death of Mr. Damião Ximenes-Lopes*

177. The States' duty to investigate violations of the rights to life and humane treatment is a prerequisite for guaranteeing said rights, pursuant to Article 1(1) of the American Convention. In the instant case, the Court has established that the State has breached its duties of respect, prevention and protection, and is thus responsible for the violation of Mr. Damião Ximenes-Lopes' rights to life and to humane treatment (*supra* para. 150).

178. In view of the facts, the State commenced a police inquest and took various steps in connection with the death of Mr. Damião Ximenes-Lopes. The Court will attempt to establish whether such steps have been serious, impartial and effective, and whether or not they have been conducted merely as a formality.¹³³

¹³⁰ Cf. *Case of Baldeón-García*, *supra* note 4, para. 141; *Case of López-Álvarez*, *supra* note 121, para. 28; and *Case of Herrera Ulloa*. Judgment of July 2, 2004. Series C No. 107, para. 109.

¹³¹ Cf. *Case of Baldeón-García*, *supra* note 4, para. 142; *Case of Lori Berenson-Mejía*, *supra* note 24, para. 133; and *Case of Juan Humberto Sánchez*, *supra* note 30, para. 120.

¹³² Cf. *Case of Baldeón-García*, *supra* note 4, para. 143; *Case of López-Álvarez*, *supra* note 121, para. 147; and *Case of Pueblo Bello Massacre*, *supra* note 25, para. 169.

¹³³ Cf. *Case of Baldeón-García*, *supra* note 4, para. 92 and 93; *Case of Pueblo Bello massacre*, *supra* note 25, para. 143 and 144; and *Case of Gómez Palomino*, *supra* note 21, para. 77.

179. In view of the violent circumstances surrounding the death of Mr. Damião Ximenes-Lopes (*supra* para. 112(11)), this Court considers that it is necessary in the investigation of any violent death to observe similar guidelines to those in the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions. The government authorities conducting an investigation must, *inter alia*: (a) identify the victim; (b) recover and preserve evidentiary material related to the death to aid in any potential prosecution of those responsible; (c) identify possible witnesses and obtain statements from them concerning the death; (d) determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death; (e) distinguish between natural death, accidental death, suicide and homicide. In addition, it is necessary to conduct a thorough investigation of the crime scene and rigorous autopsy examinations, and analyses of human remains must be conducted by competent professionals, following the most appropriate procedures.¹³⁴

180. Initially, in spite of the evidence of the ill-treatment against Mr. Damião Ximenes-Lopes, physician Francisco Ivo de Vasconcelos, from the *Casa de Reposo de Guararapes*, who examined the alleged victim after his death, diagnosed the cause of the death as "cardio respiratory arrest" (*supra* para. 112(12)).

181. With reference to the above-mentioned examination, on January 11, 2000 physician Francisco Ivo de Vasconcelos stated before the Coordinadora Municipal de Control, Evaluación y Auditoria de la Secretaría de Salud y Asistencia Social) that the body of the patient "was lying on the floor, where [he] conducted the primary examination in an attempt to establish the cause of [his] death[...]." 'In addition, in his statement of October 11, 2000 before Third Chamber of the Trial Court in and for Sobral, he stated that he "went on to investigate the possible cause of the death, and found no signs of an object that may have choked the patient, there were no signs of strangulation or traumatism; neither was there external bleeding, so [the deponent] wrote in the death certificate 'cardio respiratory arrest'. [The patient] had no external injury or excoriation, bleeding had ceased, there was no hematoma in his scalp, and there were no signs of strangulation. [The deponent] had opened the alleged victim's buccal cavity to check for any object, and then [he had] asked the nurse to notify the victim's relatives of his death and prepare the documents[...]."

182. This Court considers that, in examining the body of the alleged victim, the above-mentioned physician Francisco Ivo de Vasconcelos, failed to adopt appropriate measures since, as he himself asserted in his statement, he examined the body and failed to inform that it had external injuries, which were later described in the autopsy examination report, even though he knew of the circumstances of violence in the *Casa de Reposo de Guararapes* and of the specific conditions in which the alleged victim was kept (*supra* para. 112(9) and 112(56)). It follows from the above-mentioned statements that in his examination the physician ruled out possible causes of death, but failed to provide grounds for the diagnosis of death due to cardio respiratory arrest and ignored the presence of injuries; therefore, he had to require that an autopsy examination be performed in order to conduct a thorough examination of the body of the alleged victim.

¹³⁴ Cf. *Case of Baldeón-García*, *supra* note 4, para. 96; *Case of Pueblo Bello Massacre*, *supra* note 25, para. 177; and *Case of Mapiripán Massacre*, *supra* note 21, para. 224. See also, Véase también, *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, Doc. E/ST/CSDHA/12 (1991).

183. In view of the lack of clarity concerning the circumstances surrounding the death of Mr. Ximenes-Lopes, their relatives took the body to the Forensic Institute of Fortaleza city, the capital of the state of Ceará, for an autopsy examination.

184. The Forensic Institute conducted an autopsy examination of Mr. Damião Ximenes-Lopes, from which it established that this was a case of “death of undetermined caused” and stated the presence of several injuries, but failed to state how they had been inflicted. It also failed to describe the examination of the alleged victim’s brain. This led the Attorney General’s Office to request the chief of police to elicit from the Medico-Legal Institute a clarification of the autopsy report concerning the injuries described therein. After the Chief of Police’s second request, the Institute further stated that “[the] injuries [...] were caused by the force of a blunt object (or by multiple blows or falls)” (*supra* para. 112(14) and 112(15)). It is worth noting that no photographs were taken of the body of Mr. Damião Ximenes-Lopes.

185. On June 20, 2001, the 5th Chamber in Civil Matters hearing the civil action for damages required that the body of the alleged victim be exhumed. The conclusive report reaffirmed that the death of Mr. Ximenes-Lopes was a “death of undetermined caused” (*supra* para. 112(16) and 112(54)).

186. In this regard, Ms. Lídia Dias-Costa, in her expert report rendered in the public hearing before the Court, stated that as a result of the exhumation of the body of Mr. Damião Ximenes-Lopes it was possible to verify that his brain had been dissected as it is regular procedure for autopsy examinations, but that she found no justified reasons for failing to state so in the autopsy report made in 1999. According to the expert witness, this is a routine procedure and there is no reason not to examine the brain or to fail to describe what was examined. In addition, she stated that, based on the patient’s clinical progress, a diagnosis of violent death caused by traumatic brain injury could be established (*supra* para. 47(4)(a)). The post-exhumation examination report confirms that the skull showed a “transversal craniotomy” as a result of the previous expert examination (*supra* para. 112(16)).

187. This Court considers that the guideline for the autopsy performed on Mr. Damião Ximenes-Lopes on October 4, 1999, failed to meet the internationally recognized standards for forensic investigations, as it failed to include, *inter alia*, a thorough description of external injuries and of the object that caused them; the opening and description of the three body cavities (head, thorax and abdomen); the conclusion reported that the death was due to “an undetermined cause,” and therefore the object that caused it was not mentioned either. Moreover, the Technical and Scientific Department of the Medico-Legal Institute that performed the exhumation also concluded that the case involved “death of undetermined cause.” This Court considers that the States, pursuant to their obligation to prosecute crimes, must charge a competent authority with the duty of performing forensic inquiries, including autopsy examinations, pursuant to domestic and international guidelines. In the instant case, it is clear that the Forensic Institute failed to establish or document the findings of the autopsy examination in accordance with forensic standard practice.

188. In addition, it has been proved that the police investigation of the death of Mr. Damião Ximenes-Lopes was commenced by the Sobral Police Station on November 9, 1999, 36 days after the events in the Guararapes Rest Home (*supra* para. 112(18)).

189. There was a lack of due diligence by the Government authorities in failing to immediately commence the investigation of the events, which prevented, among other things, the timely preservation and gathering of evidence and the identification of eyewitnesses. In addition, the Government officials did not preserve the evidence or inspect the Guararapes Rest Home, nor did they conduct a reenactment of the events to explain the circumstances in which Mr. Ximenes-Lopes died.

190. Owing to the defective investigation, the relatives of the alleged victim informed several entities of the events connected with the death of Mr. Ximenes-Lopes and claimed for justice in the case. Albertina Viana-Lopes, mother of the alleged victim, made a claim before the Control, Evaluation and Audit Municipal Coordinator for the Health and Social Services Bureau, and Irene Ximenes-Lopes-Miranda, sister of the alleged victim, filed a claim before the Civil and Human Rights Commission of the Legislative Assembly of the state of Ceará (*supra* para. 112(17)).

191. All the above-mentioned deficiencies show the negligence of the authorities responsible for examining the circumstances of the death of Mr. Damião Ximenes-Lopes and constitute a severe breach of the duty to investigate the events.¹³⁵

B) Criminal Proceedings

192. Under Article 25(1) of the Convention, the States have the duty to ensure that all persons under its jurisdiction have effective judicial recourse against violations of their fundamental rights.¹³⁶ Not only must recourse be provided, but it also must be effective, i.e., it must be capable of producing results or providing answers to violations of rights established by the Convention.¹³⁷ This safeguard is one of the cornerstones of the American Convention and the Rule of Law in a democratic society, as set forth in the Convention.¹³⁸

193. The effective recourse under Article 25 of the Convention must be substantiated in accordance with the rules of due process of law set forth in Article 8 thereof. Consequently, the victims of violations of human rights, or their next of kin,

¹³⁵ Cf. *Case of Pueblo Bello Massacre*, *supra* note 25, para. 178; and *Case of Mapiripán Massacre*, *supra* note 21, para. 228.

¹³⁶ Cf. *Case of Baldeón-García*, *supra* note 4, para. 144; *Case of Acevedo Jaramillo et al.*, *supra* note 4, para. 214; and *Case of López-Álvarez*, *supra* note 121, para. 137.

¹³⁷ Cf. *Case of Baldeón-García*, *supra* note 4, para. 144; *Case of Acevedo Jaramillo et al.*, *supra* note 4, para. 213; and *Case of López-Álvarez*, *supra* note 121, para. 137.

¹³⁸ Cf. *Case of Baldeón-García*, *supra* note 4, para. 144; *Case of López-Álvarez*, *supra* note 121, para. 138; *Case of Palamara Iribarne*, *supra* note 31, para. 184; *Case of Acosta Calderón*. Judgment of June 24, 2005. Series C No. 129, para. 93; *Case of Yatama*. Judgment of June 23, 2005. Series C No 127, para. 169; *Case of Serrano Cruz Sisters*. Judgment of March 1, 2005. Series C No. 120, para. 75; *Case of Tibi*, *supra* note 111, para. 131; *Case of 19 Tradesmen*, *supra* note 108, para. 193; *Case of Maritza Urrutia*, *supra* note 111, para. 117; *Case of Juan Humberto Sánchez*, *supra* note 30, para. 121; *Case of Cantos*, *supra* note 126, para. 52; and *Case of Hilaire*, *supra* note 126, para. 150; *Case of Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No 79, para. 112; *Case of Ivcher Bronstein*. Judgment of February 6, 2001. Series C No 74, para. 135; *Case of the Constitutional Court*. Judgment of January 31, 2001. Series C No 71, para. 90; *Case of Bámaca Velásquez*, *supra* note 111, para. 191; *Case of Cantoral Benavides*, *supra* note 111, para. 163; *Case of Durand and Ugarte*. Judgment of August 16, 2000. Series C No. 68, para. 101; and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 108, para. 234.

must be granted full possibilities of being heard and appearing at the corresponding legal proceedings, in furtherance of the discovery of the truth, the punishment of the offenders as well as to be awarded an adequate compensation.¹³⁹

194. In response to the cruel, inhuman, and degrading treatment received by Mr. Damião Ximenes-Lopes and his subsequent death, the first recourse the State should have provided was an effective investigation and a legal proceeding conducted pursuant to the requirements of Article 8 of the Convention, providing for the discovery of the truth, punishment of the perpetrators and the award of adequate compensation.

195. Under Article 8(1) of the Convention, one of the requirements of a fair trial is that the courts must determine the cases submitted to them within a reasonable time. The reasonability of the time period must be appreciated in the light of the total length of the criminal proceeding. Under criminal procedure, said time period starts when the first pleading is filed against certain person as the alleged perpetrator of an offense and it ends when a final and non-appealable judgment is rendered.¹⁴⁰

196. In order to establish whether the time period in the instant case was reasonable pursuant to Article 8(1) of the Convention, the Court will take into account three elements: a) the complexity of the matter, b) the procedural activities carried out by the interested party, and c) the conduct of judicial authorities.¹⁴¹

197. Based on the considerations included in the chapter dealing with Proven Facts and on the arguments of the Commission, the representatives and the State, this Court considers that this is not a complex case. There is only one victim, who has been clearly identified and who died in a healthcare institution, and therefore, the prosecution of the allegedly responsible persons, who are identified and localized, simple.

198. In addition, from the body of evidence it follows that the relatives of Mr. Ximenes-Lopes have cooperated in the course of the police investigation and the criminal and civil proceedings in order to further the proceedings, discover the truth and establish responsibilities. Albertina Viana-Lopes is a civil complainant in the criminal action, permitting the family of the alleged victim to take part in and oversee the proceedings. At this point it should be noted that, although the victims of human rights violations or their next of kin must have ample opportunity to participate and be heard during the investigation and the judicial proceedings (*supra* para. 193), the State must be fully committed to the investigation and must assume it not as mere measures or actions performed for private purposes that depend

¹³⁹ Cf. *Case of Baldeón-García*, *supra* note 4, para. 93 and 146; *Case of Pueblo Bello Massacre*, *supra* note 25, para. 144; *Case of Mapiripán Massacre*, *supra* note 21, para. 219; *Case of Moiwana Community*, *supra* note 125, para. 147; *Case of Serrano Cruz Sisters*, *supra* note 138, para. 63; *Case of 19 Tradesmen*, *supra* note 108, para. 186; *Case of Las Palmeras*. Judgment of December 6, 2001. Series C No. 90, para. 59; *Case of Durand and Ugarte*, *supra* note 138, para. 129; and *Case of the "Street Children"* (*Villagrán Morales et al.*), *supra* note 108, para. 227.

¹⁴⁰ Cf. *Case of Baldeón-García*, *supra* note 4, para. 150; *Case of López-Álvarez*, *supra* note 121, para. 129; and *Case of Tibi*, *supra* note 111, para. 169.

¹⁴¹ Cf. *Case of Baldeón-García*, *supra* note 4, para. 151; *Case of López-Álvarez*, *supra* note 121, para. 132; and *Case of Pueblo Bello Massacre*, *supra* note 25, para. 171.

upon the procedural acts of the victims or their next of kin or on the presentation of evidence by private interested parties, but as its own legal duty. Public authorities must act in furtherance of the truth-seeking function of the State.¹⁴²

199. The delay in the proceedings was due to the conduct of judicial authorities only. On March 27, 2000, the Attorney General's Office filed a criminal complaint against the alleged perpetrators, and after six years of the commencement of the action, no decision has been rendered by the trial court. The competent authorities have confined themselves to taking testimony. It has been established that the Third Chamber of the Trial Court in and for Sobral took over two years to hold the hearings aimed at taking testimony from witnesses and experts, and in some periods it has taken no steps whatsoever towards adjudicating the case (*supra* para. 112(29)). In this regard, this Court deems inadmissible the State's argument that the delay is due, among other things, to the large number of statements it has had to take, or to the fact that it has required additional courts to take the statements of witnesses who did not live in Sobral, or to the workload of the court hearing the case.

200. The State further alleged that the delay in the criminal proceeding was due to the fact that on September 22, 2003, the Attorney General's Office extended the accusation to two other persons. At this point it is worth noting that the Attorney General's Office is an organ of the State, and thus its actions and omissions may affect its international liability. The Attorney General's Office took more than three years to extend the charges against clinical director Francisco Ivo de Vasconcelos, and auxiliary nurse Elias Gomes-Coimbra, both from the *Casa de Reposo Guararapes* (Guararapes Rest Home), even though Mr. Ivo de Vasconcelos was the physician who took care of Mr. Ximenes-Lopes on the day of his death and Mr. Gomes-Coimbra was the nurse who had taken care of the alleged victim during his stay in the institution. On May 25, 2000, two months after commencement of criminal proceeding, the Center for the Operational Support of Socially Marginalized Groups of the Office of the State Attorney under the Attorney General's Office informed the Prosecutor in the case of the death of Mr. Damião Ximenes-Lopes that, in view of the body of evidence collected, he should extend the charges, as "it [was] an institution and legal imposition." The Court considers that the above-mentioned allegation of the State does not provide grounds to justify the delay in the criminal proceeding.

201. Finally, two years after the extension of the charges, no significant progress has been made in the case.

202. The Court points out that the State in its final arguments informed that "the preliminary investigation stage in the criminal case had been concluded, and that the judgment was due in the first months of 2006." However, it has been proved with the evidence submitted to the Court by the parties, that the proceeding has been halted until an interlocutory decision is rendered concerning the request made by one of the initial defendants that the presentation of the final arguments be suspended, and therefore, the proceedings are not ready for the judge to render a final judgment (*supra* para. 112(42)).

¹⁴² Cf. *Case of Baldeón-García*, *supra* note 4, para. 93; *Case of Pueblo Bello Massacre*, *supra* note 25, para. 144; and *Case of Gómez-Palomino*, *supra* note 21, para. 79.

203. The time in which the criminal proceeding in the instant case has been conducted is not reasonable, inasmuch as after six years, i.e., seventy-five months after its commencement, no decision has been rendered by the trial court, and there are no reasons to justify such delay. This Court considers that such delay exceeds by far the reasonable time provided for in the American Convention, and constitutes a violation of the right to a fair trial.¹⁴³

204. Besides, the fact that the criminal proceeding has not been concluded has had specific consequences for the next of kin of Mr. Damião Ximenes-Lopes, since, under the legislation of the State, the civil reparation for the damages caused by a wrongful act that constitutes a crime may be subject to the establishment of the crime in a criminal action; therefore, no decision has been rendered by the trial court in the civil action for damages. In other words, the lack of justice in the criminal proceedings has prevented the next of kin of Mr. Ximenes-Lopes, particularly his mother, from receiving monetary compensation for the damage caused in the instant case.

205. In view of the foregoing, the Court considers that the State failed to provide an effective remedy to enforce, within a reasonable time, the right to a fair trial of Albertina Vianas-Lopes and Irene Ximenes-Lopes-Miranda, mother and sister respectively of Mr. Damião Ximenes-Lopes, fully in accordance with the right to a fair trial.

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206. The Court concludes that the State has not provided the next of kin of Mr. Ximenes-Lopes with effective recourse to ensure a fair trial, the establishment of the truth, the investigation, identification, prosecution and eventual punishment of the perpetrators and the reparation of the aftermath of the violations. Therefore, the State is responsible for the violation of the right to a fair trial and the right to judicial protection set forth in Articles 8(1) and 25(1) of the American Convention in relation with Article 1(1) thereof, to the detriment of Albertina Viana-Lopes and Irene Ximenes-Lopes-Miranda.

XI

REPARATIONS

APPLICATION OF ARTICLE 63(1)

OBLIGATION TO PROVIDE ADEQUATE REPARATIONS

207. In accordance with the analysis set forth in previous chapters, the Court has declared, based on the partial acknowledgement of the State's liability, the violation of Articles 4(1) and 5(1) and (2) of the American Convention, all in relation to Article 1(1) thereof, to the detriment of Mr. Damião Ximenes-Lopes; based on the facts of the case and the evidence submitted to this Court, the violation of Article 5 of the

¹⁴³ Cf. *Case of Baldeón-García*, *supra* note 4, para. 153; *Case of García-Asto and Ramírez-Rojas*, *supra* note 20, para. 167 to 172; and *Case of Gómez-Palomino*, *supra* note 21, para. 85.

Convention, in relation to Article 1(1) thereof, to the detriment of Albertina Viana-Lopes, Irene Ximenes-Lopes-Miranda, Francisco Leopoldino Lopes and Cosme Ximenes-Lopes; and the violation of Articles 8(1) and 25(1) of the Convention, in relation to Article 1(1) of said Convention, to the detriment of Albertina Viana-Lopes and Irene Ximenes-Lopes-Miranda. The Court has held, on several occasions, that any violation of an international obligation resulting in harm carries with it an obligation to provide adequate reparations.¹⁴⁴ To that end, Article 63(1) of the American Convention provides that:

[i]f the Court finds that there has been a violation of a right or freedom protected by [this] Convention, the Court shall rule that [the] party harmed be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the party harmed.

208. As pointed out by the Court, Article 63(1) of the American Convention enshrines a customary rule that is at the basis of contemporary International Law concerning the liability of States. Thus, upon the occurrence of an internationally wrongful act attributable to a State, the international liability of such State arises, with the consequent duty to make reparations and to have the consequences of the violation remedied.¹⁴⁵ Such international liability is of a different kind than that in the domestic law.¹⁴⁶

209. The reparation of the damage caused by the violation of an international obligation involves, whenever possible, full compensation (*restitutio in integrum*), which consists of the restoration to the original condition existing prior to the violation. If this is not feasible, the international court shall determine the measures to be ordered to protect the rights that were affected, as well as to make reparations for the consequences of the infringements and shall determine a compensation for the damage caused¹⁴⁷ or other kind of relief. The obligation to provide reparations, which is governed in every aspect (i.e., scope, nature, form and determination of the beneficiaries) by international Law, must not be altered or breached by the respondent on the basis of its domestic law.¹⁴⁸

210. Reparations, as the term suggests, are those measures necessary to eliminate the effects of the violations committed. The nature and amount of the reparations depend on the pecuniary and non-pecuniary damage caused.

¹⁴⁴ Cf. *Case of Baldeón-García*, *supra* note 4, para. 174; *Case of Sawhoyamaxa Indigenous Community*, *supra* note 4, para. 195; and *Case of Acevedo Jaramillo et al.*, *supra* note 4, para. 294.

¹⁴⁵ Cf. *Case of Baldeón-García*, *supra* note 4, para. 175; *Case of Sawhoyamaxa Indigenous Community*, *supra* note 4 para. 196; and *Case of Acevedo Jaramillo et al.*, *supra* note 4, para. 295.

¹⁴⁶ Cf. *Case of Mapiripán Massacre*, *supra* note 21, para. 211; *Case of Serrano Cruz Sisters*, *supra* note 138, para. 56; *Case of Gómez Paquiyauri Case*, *supra* note 108, para. 73; and *Case of Cesti Hurtado. Preliminary Exceptions*. Judgment of January 26, 1999. Series C No. 49, para. 47.

¹⁴⁷ Cf. *Case of Baldeón-García*, *supra* note 4, para. 176; *Case of Sawhoyamaxa Indigenous Community*, *supra* note 4 para. 197; and *Case of Acevedo- Jaramillo et al.*, *supra* note 4, para. 296.

¹⁴⁸ Cf. *Case of Baldeón-García*, *supra* note 4, para. 176; *Case of Sawhoyamaxa Indigenous Community*, *supra* note 4 para. 197; and *Case of Acevedo Jaramillo et al.*, *supra* note 4, para. 296.

Reparations shall not, in any case, entail either the enrichment or the impoverishment of the victim or his or her family.¹⁴⁹

211. In light of the evidence gathered throughout the proceedings and the abovementioned criteria, the Court will proceed to analyze the claims submitted by the Commission and the representatives and the considerations of the State regarding reparations, in order to determine first the beneficiaries of the reparations and then, to order the necessary measures to redress the pecuniary and non-pecuniary damage sustained in the instant case, and to adopt measures of satisfaction and non-repetition and finally to award court costs and expenses,

212. The Court will now summarize the arguments of the Inter-American Commission, the representatives and the State concerning reparations.

Arguments of the Commission

213. Regarding to reparations, the Commission argued, *inter alia*, that:

a) the beneficiaries of the reparations are Albertina Viana-Lopes, victim's mother; Francisco Leopoldino-Lopes, victim's father; Irene Ximenes-Lopes-Miranda, victim's sister; and Cosme Ximenes-Lopes, victim's identical twin.

b) In relation to pecuniary damage:

i. the Commission requested the Court to determine, on equitable grounds, the amount of the compensation for compensatory damage and lost profits, and

ii. regarding to lost profits, the Commission observed that there was no loss of income concerning the disability pension the victim received from the National Institute of Social Security until his death. However, it pointed out that the victim could perform productive activities in the future to increase his income.

c) In relation to non-pecuniary damage:

i. the Court must determine in equity the payment of compensation for non-pecuniary damage, taking into account the level of suffering and distress sustained by the victim's next of kin as a result of the death of Mr. Damião Ximenes-Lopes, and for the struggle for justice, and

ii. the life death pension paid monthly to Albertina Viana-Lopes is inadequate as reparation of non-pecuniary damage, as the State failed to consider all the aspects entailed in pecuniary and non-pecuniary damage and it also failed to comply with the international standards of compensation for human rights violations.

d) In relation to other forms of reparation, the Commission requested the Court to order the State to:

¹⁴⁹ Cf. *Case of Baldeón-García*, *supra* note 4, para. 177; *Case of Sawhoyamaya Indigenous Community*, *supra* note 4 para. 198; and *Case of Acevedo Jaramillo et al.*, *supra* note 4, para. 297.

- i. adopt all measures necessary to fulfill its duty to oversee the hospitalization conditions of mentally ill persons in health care institutions, including adequate judicial inspection and control systems;
 - ii. adopt all measures necessary to avoid cruel, inhumane or degrading treatment in health care centers, including training programs, and to effectively prohibit and punish such conduct;
 - iii. implement minimum standards for preparing medical reports, such as those set forth in the Istanbul Protocol;
 - iv. immediately cease the denial of justice to which the next of kin of Mr. Ximenes-Lopes are subjected regarding to his death;
 - v. officially make public the State's acknowledgement of partial responsibility; and
 - vi. establish mechanisms for investigating, reporting and documenting deaths, torture or cruel, inhuman or degrading treatment of mentally ill persons.
- e) In relation to expenses and legal costs, the Commission pointed out that the Court must order the State to bear expenses and legal costs incurred by the next of kin of Damião Ximenes-Lopes in litigating the case before the domestic courts, if any, and in bringing the case to the Inter-American human rights protection system.

Arguments of the Representatives

214. In relation to reparations, the representatives argued, *inter alia*, that:

- a) the beneficiaries of the reparations are Albertina Viana-Lopes, victim's mother; Francisco Leopoldino-Lopes, victim's father; Irene Ximenes-Lopes-Miranda, victim's sister; and Cosme Ximenes-Lopes, victim's identical twin.
- b) In relation to pecuniary damage:
 - i. as regards to compensatory damages, the next of kin have incurred expenses including transportation between the municipalities of Sobral and Fortaleza in order to gather documentation, the funeral expenses of Mr. Damião Ximenes-Lopes, transportation of the victim's body from Sobral to Fortaleza for the autopsy examination, and medicines for Mr. Ximenes-Lopes' parents. Therefore, they requested the Court to set the amount of USD 10,000.00 (ten thousand United States dollars) based on the principle of equity. Such amount includes expenses incurred both in the domestic and the international court system;
 - ii. as regards to lost profits, the representatives alleged that a mentally ill person may have a productive life. Therefore, taking into account the victim's life expectancy and the minimum salary paid by the State, they requested the Court to set, on equitable grounds, the amount of USD 67,550.00 (sixty-seven thousand, five hundred and fifty United States dollars) as compensation to be paid to Mr. Damião Ximenes-Lopes. In addition, Irene Ximenes-Lopes-Miranda spent three years without motivation for work and lost her job after his brother's death. The representatives requested the Court to set, on equitable grounds, the amount of USD 41,850.00 (forty-one thousand, eight hundred and fifty United States Dollars) as compensation to be paid to her, and

iii. they asserted that the pension afforded to Albertina Viana-Lopes under law No. 13,491 is not sufficient to cover the damage caused. She receives the disability pension previously afforded to Mr. Damião Ximenes-Lopes.

c) In relation to pecuniary damage:

i. the representatives requested the Court to set, on equitable grounds, the amount of USD 80,000.00 (eighty thousand United States dollars as compensation for the suffering undergone by Mr. Damião Ximenes-Lopes;

ii. the representatives further stated that the victim's death caused Albertina Viana-Lopes, mother of the victim, to suffer depression, and that she is currently suffering emotional distress. The life annuity granted by the State cannot be considered a reparation for her or for the other next of kin of the victim. Therefore, they requested the Court to set, on equitable grounds, the amount of USD 50,000.00 (fifty thousand United States dollars) as the compensation to be paid to her. In addition, they stated that the lady was the direct victim of the abuse and ill treatment suffered by his son, since she witnessed the torture he had been subjected to and she was treated with lack of respect by the director of the *Casa de Reposo Guararapes (Guararapes Rest Home)*. Therefore, they requested the Court to raise the amount of the compensation in USD 25,000.00 (twenty-five thousand United States dollars);

iii. the representatives also stated that Mr. Francisco Leopoldino Lopes, Damião Ximenes-Lopes' father, had suffered depression for a long time and he thinks that justice will never be served in the case of his son. He is currently a regular churchgoer, seeking spiritual comfort. Therefore, they requested the Court to set, on equitable grounds, the amount of USD 50,000.00 (fifty thousand United States dollars), as the compensation to be paid to him;

iv. the death of the victim caused Irene Ximenes-Lopes-Miranda, Damião Ximenes-Lopes' sister, physical and psychological suffering; she lost her job 26 days after the death of his brother and has suffered depression for three years the consequence of which was lack of motivation to work. She suffered mental and emotional exhaustion in the search for justice because of the several meetings and hearings she had to attend with health, judicial and human rights institutions, and she felt "humiliation for begging for justice." In addition, the death of the victim caused Mr. Cosme Ximenes-Lopes, Damião Ximenes-Lopes' identical twin, severe distress, as he could suffer the same as his brother went through should he need psychological aid from a health care institution again. He has suffered six years of frustration as a result of the impunity of the perpetrators and constant grief for the loss of his twin brother. Therefore, they requested the Court to set, on equitable grounds, the amount of USD 15,000.00 (fifteen thousand United States dollars), as compensation to be paid to each of them.

d) In relation to other means of reparation, they pointed out that:

i. they recognize the State's initiative to improve the conditions of psychiatric care;

ii. the complaints of serious human rights violations committed in mental health institutions must be effectively investigated, and all those involved must be held liable and punished;

iii. the oversight entities must establish procedures for supervising the operation of health units;

- iv. the State must provide for the closing of those psychiatric units not approved by the Psychiatric Care Services National Assessment Program that are still operating;
 - v. the State must approve and implement Bill No. 429/2003, which establishes the "Rules on Persons with Disabilities," and
 - vi. the State must adopt all measures as may be necessary to eradicate the use of cruel, inhuman or degrading treatment, adapt psychiatric institutions to meet the requirements of the applicable international instruments, and prohibit and punish such conducts.
- e) In relation to expenses and court costs, the representatives alleged that:
- i. the Ximenes-Lopes family incurred a series of expenses in taking administrative and procedural steps after the death of the victim, and thus requested the Court to set, on equitable grounds, the amount of USD 10,000.00 (ten thousand United States dollars), and
 - ii. Justicia Global incurred expenses to provide legal counsel services in the international litigation. Therefore, they requested the Court to set, on equitable grounds, the amount of USD 20,000.00 (twenty thousand United States dollars). In addition, the representatives stated the expenses they have incurred as attorneys' fees during the years they litigated the case before the Inter-American System of Human Rights Protection, and requested the Court to set, equitable grounds, the amount of USD 25,000.00 (twenty-five United States dollars) as compensation for them.

Arguments of the State

215. In relation to reparations, the State argued, *inter alia*, that:

- a) As regards to the beneficiaries, there is no damage to be compensated for in relation to Francisco Leopoldino Lopes, Irene Ximenes-Lopes-Miranda and Cosme Ximenes-Lopes; and as regards to Albertina Viana-Lopes, the moral damage she suffered has already been repaired, both from a monetary and a symbolic point of view.
- b) In relation to pecuniary damage:
 - i. Albertina Viana-Lopes did not suffer monetary loss or loss of profits, as she is receiving a monthly life death pension from the National Institute of Social Security. A death pension is only allowed to dependents of the deceased. Therefore, it is not appropriate to pay death pension and lost profits to the remaining next of kin of the victim, as they provided for their own income and did not depend financially upon Mr. Damião Ximenes-Lopes;
 - ii. there has been no direct damage, as the criminal proceeding was instituted by the Attorney General's Office;
 - iii. in the civil action for damages, Albertina Viana-Lopes litigated *in forma pauperis*;
 - iv. the expenses incurred by the next of kin of Mr. Damião Ximenes-Lopes were incurred voluntarily, and therefore the State should not compensate them for such expenses, and
 - v. the state of Ceará awarded Albertina Viana-Lopes a monthly life pension of BRL 308.00 (three hundred and eight *reales*). Said pension corresponds to the minimum salary in force in the state of Ceará, adjusted by the same index applied to the state public servants. Said pension contributes

to the household budget and is perfectly adequate to compensate for the loss suffered, thus avoiding unjust enrichment.

- c) In relation to non-pecuniary damage:
- i. Albertina Viana-Lopes filed a civil action for “moral damages” against private individuals rather than the State. Such proceeding was stayed until the criminal case would be adjudicated. There is a possibility of *bis in idem* occurring in the instant case, provided that damages are awarded in the civil action and the defendant pays compensation and the Court simultaneously orders the State to pay compensation for “moral damages” to Mrs. Viana-Lopes. Therefore, the same loss would thus be twice compensated for;
 - ii. Mr. Cosme Ximenes-Lopes has not learned of the death of his brother, and there can be no moral damage caused by that which is unnoticed;
 - iii. Irene Ximenes-Lopes-Miranda cannot be considered to be directly affected, as she did not have a close relationship with Mr. Damião Ximenes-Lopes.
 - iv. Damião Ximenes-Lopes’ father had no father-to-son relationship with the victim, so he is not entitled to any compensation for non-pecuniary damage;
 - v. Mr. Damião Ximenes-Lopes had nine siblings. In accordance with the concept of “fair justice,” payment of compensation for moral damage to only two siblings is inadmissible. There is no way to measure the grief suffered when a next of kin dies, so in assessing the reparation of the pain and suffering, a judge should use the same criteria for all the siblings, and
 - vi. it has recognized the existence of “moral damages” and its duty to provide monetary compensation for Mr. Damião Ximenes-Lopes’ mother, so it has paid just compensation in the domestic system, through the payment of a state death pension in addition to the federal government death pension for the life of Albertina Viana-Lopes, both of which should be considered by the Court. Mrs. Viana-Lopes has already been compensated for the moral and pecuniary damage caused. The rest of the victim’s next of kin identified by the Commission and the representatives are naturally eligible to be awarded the remaining forms of reparation.
- d) In relation to other forms of reparation, the State argued that it had adopted all steps expected from a constitutional democratic State in order to prevent events such as those suffered by Mr. Damião Ximenes-Lopes from happening again. It has adopted several measures in the Municipality of Sobral, among which are the specialized units for the treatment of persons with a variety of diseases. Likewise, it has adopted, *inter alia*, measures at the domestic level, such as passing Law No. 10,216 in 2001, known as the “Law of Psychiatric Reform;” it has held a seminar on the “Right to Mental Health — regulation and application of Law No. 10,216,” and implemented several programs concerning health services. Finally, the State pointed out that it has made symbolic reparations by renaming the Sobral Psychosocial Care Center (CAPS) after the victim, “Damião Ximenes-Lopes Psychosocial Care Center,” holding the Third National Mental Health Conference at the now named Damião Ximenes-Lopes Hall, and publicly stating at the hearing held before the Court, the partial recognition of its international liability for the violation of rights set forth in Articles 4 and 5 of the American Convention.
- e) In relation to the expenses and court costs, it argued that there are no grounds for compensating the next of kin of Mr. Damião Ximenes-Lopes at

domestic level, and that they incurred no expenses in litigating this case, either before the Commission or this Court; and that, even if they did, they failed to prove so.

Considerations of the Court

A) *BENEFICIARIES*

216. The Court considers Mr. Damião Ximenes-Lopes as the "aggrieved party", inasmuch as he was the victim of violations of rights established in Articles 4(1) and 5(1) and 5(2) of the American Convention in relation to Article 1(1) of said instrument, so he will be entitled to any reparations the Court may establish as compensation for pecuniary and non-pecuniary damage.

217. In addition, this Court considers Albertina Viana-Lopes and Irene Ximenes-Lopes-Miranda, next of kin of Mr. Damião Ximenes-Lopes, as "aggrieved parties," inasmuch as they have been victims of violations of rights established in Articles 5, 8(1) and 25(1) of the American Convention, in relation to Article 1(1) thereof (*supra* paras. 163 and 206). Moreover, this Court considers Francisco Leopoldino-Lopes and Cosme Ximenes-Lopes, next of kin of Mr. Ximenes-Lopes as "aggrieved parties," inasmuch as they have been victims of the violation of the right established in Article 5 of the American Convention, in relation to Article 1(1) thereof (*supra* para. 163). Therefore, this Court considers that the above-mentioned persons are entitled to receive the reparation this Court may order.

218. Albertina Viana-Lopes and Irene Ximenes-Lopes-Miranda, Francisco Leopoldina-Lopes and Cosme Ximenes-Lopes, are entitled to the reparation that this Court may determine as a consequence of the violations committed against Mr. Damião Ximenes-Lopes, and which shall be distributed as follows:

- a) eighty percent (80%) of the compensation shall be distributed equally among Albertina Viana-Lopes and Irene Ximenes-Lopes-Miranda, and
- b) twenty percent (20%) of the compensation shall be distributed equally among Francisco Leopoldino-Lopes and Cosme Ximenes-Lopes.

219. Should the next of kin entitled to the compensations determined in this Judgment die before their compensation is effectively granted and delivered, the amount they were entitled to shall be distributed pursuant to the rules of domestic law.¹⁵⁰

B) *PECUNIARY DAMAGE*

220. This Court will now assess the pecuniary damage, which involves a loss or impairment of the earnings of the victim and, if appropriate, of his next of kin, and

¹⁵⁰ Cf. *Case of Baldeón-García*, *supra* note 4, para. 192; *Case of López-Álvarez*, *supra* note 121, para 203; and *Case of Gómez Palomino*, *supra* note 21, para. 123.

the expenses incurred as a consequence of the events in the instant case.¹⁵¹ In this regard, the Court will set an amount as damages intended to compensate for the monetary consequences of the violations established in this Judgment. In order to render a decision concerning pecuniary damage, the Court will take into account the arguments of the parties, the body of evidence and the case law of the Court.

B.1. Lost Earnings

221. The representatives and the Commission requested the Court to award Mr. Damião Ximenes-Lopes a compensation for lost earnings.

222. It has been proved that Mr. Damião Ximenes-Lopes' only source of income at the time of his death was a disability pension from the National Institute of Social Security. Pursuant to Section 3 of Law No. 8,212/9, as a result of the death of the beneficiary of the pension benefit, his dependent became entitled to receive it. In the instant case and pursuant to the law, the State keeps the entirety of the death pension for the benefit of Albertina-Viana-Lopes, considered as Mr. Damião-Ximenes-Lopes' dependent (*supra* para. 112(68)).

223. Based on the foregoing, and in view of the characteristics of such pension, the amount received on that account has not been reduced, so this Court considers that it is inadmissible to order compensation for lost earnings for Mr. Damião Ximenes-Lopes.

224. In addition, the representatives argued that Irene Ximenes-Lopes-Miranda, victim's sister, had left her job at the Ipueiras Municipality as a result of his brother's death, and consequently they requested the Court to set the amount of USD 41,850.00 (forty-one thousand, eight hundred and fifty United States dollars) as compensation to be paid to said lady for lost of earnings,

225. In view of the arguments of the representatives, this Court considers that there is sufficient evidence to conclude that Irene Ximenes-Lopes-Miranda ceased to receive earnings for some time as she was unable to work due to her brother's death. Therefore, this Court deems it appropriate to set, on equitable grounds, the amount of USD 10,000.00 (ten thousand United States dollars), as compensation to be paid to her for the monetary damages sustained.

B.2) Compensatory Damage

226. After analyzing the information received by the parties, the facts of the case and its own case law, the Court points out that, even though no receipts were submitted for the expenses, it can be presumed that the relatives of Damião Ximenes-Lopes incurred several funeral expenses,¹⁵² and expenses incurred as a result of the transfer of the victim's body from the city of Sobral to the city of Fortaleza for the autopsy examination. As a consequence, the Court deems it appropriate to set, on equitable grounds, the amount of USD 1,500.00 (one thousand United States dollars) as compensation for compensatory damages, which shall be paid to Albertina Viana-Lopes.

¹⁵¹ Cf. *Case of Baldeón-García*, *supra* note 4, para. 183; *Case of Sawhoyamaya Indigenous Community*, *supra* note4 para. 216; and *Case of Acevedo Jaramillo et al.*, *supra* note 4, para. 301.

¹⁵² Cf. *Case of Gómez Paquiyaury Brothers*, *supra* note 108, para. 207.

C) NON-PECUNIARY DAMAGE

227. Non-pecuniary damage may comprise pain and suffering, the detriment of values highly significant for the individuals and non-monetary alterations in the victims' living conditions. Since it is impossible to ascertain the accurate monetary value of non-monetary damage, there are only two alternatives for the integral compensation of victims. Firstly, through the payment of a sum of money or the delivery of goods or services that may be measurable in monetary terms, which the Court shall determine through the reasonable exercise of its judicial discretion and on equitable grounds. Secondly, through public works or acts intended, *inter alia*, to commemorate and dignify the victims as well as to avoid the repetition of human rights violations.¹⁵³

228. In the instant case, this Court has declared that the State is responsible for violating the rights enshrined in Articles 4(1) and 5(1) and 5(2) of the American Convention, to the detriment of Mr. Damião Ximenes-Lopes; in Article 5 of the Convention, against Albertina Viana-Lopes, Irene Ximenes-Lopes and Francisco Leopoldino Lopes and Cosme Ximenes-Lopes; and Articles 8(1) and 25(1) of the Convention, against Albertina Viana-Lopes and Irene Ximenes-Lopes, all in relation to Article 1(1) of said Convention. Therefore, the State must compensate Mr. Ximenes-Lopes and his next of kin for the damage caused.

229. Before determining the reparations applicable in the instant case, this Court deems it appropriate to address the civil action for damages filed by Albertina Viana-Lopes with the domestic courts, and the life pension established by the state of Ceará through Law No. 13,491 and granted to Albertina Viana-Lopes (*supra* para. 112(69)).

230. In relation to the civil action for damages, the State argued that the Court must prevent *bis in idem* from happening, which would occur if the civil action for damages were allowed by a domestic court and the Court decided to order the State to pay compensation for non-pecuniary damages to Albertina Viana-Lopes. Therefore, according to the State, the same loss would thus be twice compensated for. In addition, it pointed out that the action for damages was filed against private individuals rather than the State.

231. In that regard, the Court considers that the victims or their next of kin retain the right to claim compensation from the private individuals who may be responsible for the loss. In the instant case, Albertina Viana-Lopes exercised such rights in filing the civil action for damages, which is still pending resolution.

232. Due to the international liability incurred by the State, the latter has a new legal duty: the obligation to make reparations,¹⁵⁴ which is different from the

¹⁵³ Cf. *Case of Baldeón-García*, *supra* note 4, para. 188; *Case of Sawhoyamaya Indigenous Community*, *supra* note 4 para. 219; and *Case of Acevedo Jaramillo et al.*, *supra* note 4, para. 308.

¹⁵⁴ Cf. *Case of Baldeón-García*, *supra* note 4, para. 175; *Case of Sawhoyamaya Indigenous Community*, *supra* note 4 para. 196; and *Case of Baena Ricardo et al.* Competence. Judgment of November 28, 2003. Series C No 104, para. 65.

reparation the victim's next of kin may obtain from other natural or artificial persons. Therefore, the fact that a civil action for damages has been filed against private individuals with domestic courts is not an impediment for the Court to order monetary reparation for Albertina Viana-Lopes for violations of the American Convention. It is up to the State, acting within its jurisdiction, to address the consequences of the civil action for damages filed by Albertina Viana-Lopes in the domestic courts.

233. Secondly, the State requested the Court to declare that a fair compensation has been paid at local level through the state pension granted for the life of the beneficiary, as compensation for the "moral damage." In this regard, it has been proved that the state of Ceará passed Law No. 13,491, whereby a monthly pension for the life of Albertina Viana-Lopes was established, payable as of June 16, 2004, that is, more than four years after the victim's death, and which currently amounts to BLR 323.40 (three hundred and twenty-three *Reales* with forty cents) (*supra* para. 112(69)).

234. The Court recognizes the fact that the state of Ceará has granted, on its own initiative, the life pension for the benefit of Albertina Viana-Lopes. However, in view of the foregoing, this Court deems it appropriate to set an amount as compensation for the non-pecuniary damage caused to the mother or the next of kin of Mr. Damião Ximenes-Lopes, if applicable, for the violation of the human rights set forth in the American Convention as established in this Judgment (*supra* paras. 163 and 206). The Court states, however, that the above-mentioned pension is a legal benefit granted to Albertina Viana-Lopes for the term of her life, which the Court deems valuable, notwithstanding the reparations it may order for non-pecuniary damage (*infra* para. 237(b) and 238(b)).

*

235. In the instant case, in light of the suffering inflicted to Mr. Damião Ximenes-Lopes, which in turn caused his next of kin suffering, the alteration of their living conditions and other non-monetary consequences, the Court deems it appropriate to order the payment of a compensation, determined on equitable grounds, for non-pecuniary damage.¹⁵⁵

236. This Court recognizes that Albertina Viana-Lopes and Irene Ximenes-Lopes-Miranda, next of kin of Mr. Damião Ximenes-Lopes, have suffered non-pecuniary damage caused by the lack of a serious, diligent and effective investigation by the state authorities in order to establish the truth of the events concerning the victim and, eventually, to identify and punish the perpetrators. The Court considers that, in the instant case, it is not appropriate to order payment of monetary compensation for non-monetary damage caused by the violation of Articles 8(1) and 25(1) of the American Convention, inasmuch as this judgment is itself a form of reparation,¹⁵⁶ and the actions or works with public repercussion described below constitute a fair reparation under Article 63(1) of the Convention.

¹⁵⁵ Cf. *Case of Baldeón-García*, *supra* note 4, para. 189; *Case of Sawhoyamaya Indigenous Community*, *supra* note 4, para. 220; and *Case of López-Álvarez*, *supra* note 121, para. 200.

¹⁵⁶ Cf. *Case of Baldeón-García*, *supra* note 4, para. 189; *Case of Acevedo Jaramillo et al.*, *supra* note 4, para. 309; and *Case of López-Álvarez*, *supra* note 121, para. 200.

237. In light of the various aspects of damage alleged by the Commission and the representatives, the Court considers the following issues:

a) as regards to Mr. Damião Ximenes-Lopes, in order to determine the compensation for non-monetary damage, the Court takes into account the proven fact that he did not receive adequate medical care or treatment as patient with a mental disability who, due to his condition, was especially vulnerable and was subjected to cruel, inhuman and degrading treatment while at the *Casa de Reposo Guararapes* (Guararapes Rest Home) , an event that was aggravated by his death (*supra* para. 112(7), 112(8), 112(9), 112(11), 112(12), 112(56) and 112(57));

b) to determine the compensation for the non-pecuniary damage to which Albertina Viana-Lopes is entitled, this Court takes into account the fact that she is the mother of the deceased. It further takes into account that it has been established that having witnessed the appalling conditions in which her son was kept at the Guararapes Rest Home (*Casa de Reposo Guararapes*) and his subsequent death caused her great suffering and grief and physical and psychological after-effects (*supra* para. 112(70) and 157).

c) as regards to Mr. Francisco Leopoldino Lopes, with the aim of determining the compensation for non-pecuniary damage, the Court takes into account the fact that he was Mr. Damião Ximenes-Lopes' father, had a bond of affection with him and his son' s death caused him great suffering (*supra* para. 112(71) and 159).

d) as regards to Irene Ximenes-Lopes-Miranda, sister of Damião Ximenes-Lopes, the Court, in determining the compensation for non-pecuniary damage, takes into account the suffering caused by the death of his brother, with whom she had a strong bond of affection, and whose death caused her suffering such as psychological after-effects. In addition, Irene Ximenes-Lopes-Miranda has sought justice ever since her brother's death - even to the detriment of the well-being of her daughters- for which purpose she has resorted to several entities in the domestic and international jurisdictions, so she has repeatedly suffered and relived the circumstances surrounding her brother's death. (*supra* paras. 112(70), 160 and 161), and

e) in order to determine the compensation for non-pecuniary damage to be paid to Mr. Cosme Ximenes-Lopes, who has also been hospitalized in psychiatric institutions, the Court takes into account the bond of affection and the identification existing between the two brothers and the fact that the death of his brother caused him pain and suffering and put him in a state of shock, causing him depression and lack of motivation to work (*supra* paras. 112(71) and 162).

238. In view of the foregoing, the Court sets, on equitable grounds, the amount of the compensation for non-pecuniary damage, as follows:

a) for Mr. Damião Ximenes-Lopes, the sum of USD 50,000.00 (fifty thousand United States dollars), which shall be distributed among Albertina Viana-Lopes, Irene Ximenes-Lopes-Miranda, Francisco Leopoldino Lopes and Cosme Ximenes-Lopes, and

- b) for Albertina Viana-Lopes, the sum of USD 30,000.00 (thirty thousand United States dollars);
- c) for Francisco Leopoldino Lopes, the sum of USD 10,000.00 (ten thousand United States dollars);
- d) for Irene Ximenes-Lopes-Miranda, the sum of USD 25,000.00 (twenty-five thousand United States dollars); and
- e) for Cosme Ximenes-Lopes, the sum of USD 10,000.00 (ten thousand United States dollars);

239. The compensation awarded to Mr. Damião Ximenes-Lopes shall be delivered pursuant to paragraph 218 hereof, and the compensation awarded to Albertina Viana-Lopes, Irene Ximenes-Lopes-Miranda, Francisco Leopoldino Lopes and Cosme Ximenes-Lopes shall be given to each of them.

D) OTHER FORMS OF REPARATION
(MEASURES OF SATISFACTION AND GUARANTEES OF NON-REPETITION)

240. In this subparagraph, the Court will determine those measures of satisfaction intended to redress non-pecuniary damage as well as other public or publicly noticeable measures..¹⁵⁷

241. For the purpose of a public apology to the next of kin of the victim, the Court values and appreciates the partial acknowledgement of international liability made by the State during the public hearing held on November 30, 2005, in relation to the instant case (*supra* paras. 36 and 63). At that time, the State stated that:

it admits the appropriateness of the Inter-American Commission's request as regards to the violation of Articles 4 (Right to Life) and 5 (Right to Humane Treatment) of the American Convention.

242. In addition, this Court highlights the fact that on November 3, 2005, the State renamed the Sobral Psychosocial Care Center (*CAPS*), which was located in the city of Sobral in the context of the creation of the Mental Health Comprehensive Care Network, with the name of "Damião Ximenes-Lopes Psychosocial Care Center." Likewise, the State designated the Hall in which the Third Mental Health Conference was held with the name of Damião Ximenes-Lopes. This contributes to raising awareness to avoid the repetition of harmful acts such as those in the instant case and ensure remembrance of the victim..¹⁵⁸

243. In addition, the Court recognizes that the State has adopted a series of measures in the domestic jurisdiction aimed at improving the conditions of psychiatric care in the institutions of the Single Health System (*SUS*). Some of these measures were adopted by the Municipality of Sobral: it created a commission to

¹⁵⁷ Cf. *Case of Baldeón-García*, *supra* note 4, para. 193; *Case of Sawhoyamaxa Indigenous Community*, *supra* note 4 para. 228; and *Case of Pueblo Bello Massacre*, *supra* note 25, para. 264.

¹⁵⁸ Cf. *Case of Gómez Paquiyauri Brothers*, *supra* note 108, para. 236; *Case of Myrna Mack Chang*, *supra* note 108, para. 286; and *Case of Trujillo Oroza. Reparations* (Art. 63(1) Inter-American Convention on Human Rights). Judgment of February 27, 2002. Series C No. 92, para. 122.

investigate the responsibility of the *Casa de Reposo Guararapes* (Guararapes Rest Home) in relation with the death of Mr. Damião Ximenes-Lopes; it established the Mental Health Comprehensive Care Network in Sobral; in 2000 an agreement was entered into between the Family Health Program and the Mental Health Team of the Municipality of Sobral; it created a Psychiatric Admission Unit in the Estevan Ponte General Hospital of the Sobral Municipality; it created a Psychosocial Care Center (CAPS) specialized in the treatment of persons suffering psychosis and neurosis; a Psychosocial Care Center devoted to the treatment of alcoholic persons and persons addicted to other psychotropic substances; it created the Therapeutic Residential Service; a Regional Psychiatry outpatient unit at the Medical Specialties Center, and teams of the Family Health Program. Likewise, the State has adopted several measures at the domestic level, including the enactment of Law No. 10,216 in 2001, known as the "Psychiatric Reform Law"; the State has also organized the Seminar "The Right to Mental Health – Regulation and application of Law No. 10,216" on November 23, 2001, the 3rd National Mental Health Conference in December 2001, the implementation, as from 2002, of the Psychiatric Care Services National Assessment Program, the implementation, in 2004, of the Hospital Restructuring Program of the Single Health System, the creation of the "Return Home Program" and the consolidation of the Mental Health Coordinators Forum, in 2004.

244. This Court appreciates the fact that the State has adopted the above-mentioned measures, the efficient application of which shall allow for an improved health care, and its regulation and oversight within the framework of the Single Health System.

a) *Obligation to Investigate the Events that Amounted to Violations in the Instant Case*

245. The next of kin of the victims of human rights violations have the right to effective remedies. The knowledge of the truth in human rights violations such as those in the instant case is an inalienable right and an important means of reparation for the victim and, if applicable, for their next of kin, and it constitutes a fundamental way of learning the truth that allows a society to develop its own methods of reproach and deterrence.¹⁵⁹

246. Therefore, the victim's relatives are entitled -and the States are obliged- to have an effective investigation of the events carried out by State authorities, to prosecute the alleged perpetrators of the wrongful acts and, if applicable, to impose the appropriate punishment (*supra* paras. 170 to 206).¹⁶⁰

247. In the instant case, the Court has established that, after more than six years of the events, the authors of the cruel, inhuman and degrading treatment and of the death of Mr. Damião Ximenes-Lopes have not been prosecuted and have gone unpunished.

248. The Court points out that the State must ensure that the domestic proceeding aimed at prosecuting and punishing the authors of the events in the instant case is

¹⁵⁹ Cf. *Case of Baldeón-García*, *supra* note 4, para. 196; *Case of Pueblo Bello Massacre*, *supra* note 25, para. 266; and *Case of Gómez-Palomino*, *supra* note 21, para. 78.

¹⁶⁰ Cf. *Case of Baldeón-García*, *supra* note 4, para. 197; *Case of Pueblo Bello Massacre*, *supra* note 25, para. 219; and *Case of Blanco-Romero*, *supra* note 20, paras. 62 and 96.

successful in attaining its purpose within a reasonable time, directly applying in the domestic legal system the protective rules of the American Convention.

b) *Publication of the Judgment*

249. The State must, by way of measure of satisfaction,¹⁶¹ publish once in the Official Gazette and in another nationwide daily newspaper, Chapter VII of this Judgment, which deals with Proven Facts, without the footnotes, and it shall also publish the operative paragraphs hereof. as it has done in previous cases. The publication shall be made within six months as of notice of this Judgment.

c) *Implementation of Training Programs*

250. It has been proved in the instant case that at the time of the events there was no adequate service for treating and hospitalizing persons with mental disabilities, such as in the *Casa de Reposo Guararapes* (Guararapes Rest Home), an institution that provided such service under the Single Health System. Although the fact that the State has adopted several measures to improve the service is worthy of note, this Court considers that the State must continue developing a training and education program for physicians , psychiatrists, psychologists, nurses, auxiliary nurses, and all other persons working in Mental Health Care institutions, particularly on the principles that must govern the treatment to be afforded to persons who suffer from a mental disability, pursuant to the international guidelines governing the subject and those set forth in this Judgment (*supra* paras. 130 to 135).

*

251. This Judgment is *per se* a form of reparation and satisfaction for Albertina Viana-Lopes, Irene Ximenes-Lopes-Miranda, Francisco Leopoldina Lopes and Cosme Ximenes-Lopes.

E) *COSTS AND EXPENSES*

252. Court costs and expenses are embodied in the concept of reparation set forth in Article 63(1) of the American Convention. It is the Court's duty to carefully assess their extent on equitable grounds, taking into account the costs incurred before the domestic and Inter-American courts, and considering the extent to which they have been proved, the circumstances of the specific case and the nature of the international jurisdiction in the protection of human rights.¹⁶²

253. In this regard, the Court deems it fair to order the State to pay the sum of USD 10,000.00 (ten thousand United States dollars) or the equivalent amount in Brazilian currency, to Albertina Viana-Lopes in order that she can reimburse the costs incurred by the next of kin of Mr. Damião Ximenes-Lopes and pay an amount she deems appropriate to the Center for Global Justice to reimburse the costs incurred by said entity.

¹⁶¹ Cf. *Case of Baldeón-García*, *supra* note 4, para. 194; *Case of Sawhoyamaxa Indigenous Community*, *supra* note 4 para. 236; and *Case of Acevedo Jaramillo et al.*, *supra* note 4, para. 313.

¹⁶² Cf. *Case of Baldeón-García*, *supra* nota 4, párr. 208; *Case of Sawhoyamaxa Indigenous Community*, *supra* note 4, para. 237; and *Case of Acevedo Jaramillo et al.*, *supra* note 4, para. 315.

F) Method of Compliance

254. The State must pay compensations in cash, and reimburse court costs and expenses (*supra* paras. 225, 226, 238 and 253) within a year as following notice of this Judgment. The other reparations measures ordered by the Court must be complied with within a reasonable time (*supra* para. 248), or within the term expressly set forth in this Judgment (*supra* para. 249).

255. The damages awarded to the victims shall be paid directly to them. Should any victim die before receiving the corresponding compensation, the payment shall be made to the heirs.

256. If, for reasons attributable to the beneficiaries of the compensations, it is not possible for such beneficiaries to receive the payment within the term of one year, the State shall deposit such amounts in an account or draw a certificate of deposit with a reputable Brazilian banking institution, under the most favorable financial conditions allowed by legislation and banking practice. If after ten years the compensations were still unclaimed, the amounts shall be returned to the State, with any interest accrued.

257. The payment ordered as compensation for court costs and expenses incurred by the next of kin and the representatives before the domestic and the international courts, as the case may be, shall be made to Albertina Viana-Lopes (*supra* para. 253), who shall distribute such funds as appropriate.

258. The State must fulfill its monetary obligations imposed in this Judgment by tendering United States dollars or the equivalent amounts in Brazilian currency.

259. The amounts set forth in this Judgment as damages, court costs and expenses shall be fully paid to the beneficiaries pursuant to this Judgment. Therefore, they may not be affected, reduced or made conditional by tax laws currently in force or to take effect in the future.

260. If the State is in arrears, it shall pay a default interest on the amount owed equivalent to the Brazilian banking default interest.

261. In accordance with its constant practice, the Court will oversee compliance with this Judgment in all its aspects. Such oversight power is inherent to the Court's judicial powers, and it is necessary for the Court to comply with its obligation under Article 65 of the Convention. The instant case shall be deemed closed once the State has fully complied with this Judgment. Within one year as from notice hereof, the State shall submit a preliminary report to the Court on the measures adopted for the purpose of complying with this Judgment.

**XII
OPERATIVE PARAGRAPHS**

262. Therefore,

THE COURT,**DECIDES,**

Unanimously,

1. To admit the partial acknowledgment of international responsibility made by the State for the violation of the rights embodied in Articles 4(1), 5(1) and 5(2) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Damião Ximenes-Lopes, as set forth in paragraphs 61 to 81 hereof.

DECLARES,

Unanimously that:

2. The State violated, to the detriment of Damião Ximenes-Lopes, as it acknowledged, the rights to life and humane treatment enshrined in Articles 4(1) and 5(1) and 5(2) of the American Convention, in relation to the general obligation to respect and guarantee the rights embodied for in Article 1(1) thereof, as set forth in paragraphs 119 and 150 herein.

3. The State violated, to the detriment of Albertina Viana-Lopes, Irene Ximenes-Lopes-Miranda, Francisco Leopoldino Lopes and Cosme Ximenes-Lopes, next of kin of Damião Ximenes-Lopes, the right to humane treatment, enshrined in Article 5 of the American Convention, in relation to the general obligation to respect and guarantee the rights embodied in Article 1(1) thereof, as set forth in paragraphs 155 to 163 herein.

4. The State violated, to the detriment of Albertina Viana-Lopes and Irene Ximenes-Lopes Miranda, next of kin of Damião Ximenes-Lopes, the right to a fair trial and the right to judicial protection enshrined in Articles 8(1) and 25(1) of the American Convention, in relation to the general obligation to respect and guarantee the rights embodied in Article 1(1) thereof, as set forth in paragraphs 170 to 206 herein.

5. This Judgment is in and of itself a form of redress, as set forth in paragraph 251 herein.

AND RULES,

Unanimously that:

6. The State must secure, within a reasonable time; that the domestic proceedings instituted in order to investigate and punish those responsible for the events in the instant case be operative, as set forth in paragraphs 245 to 248 herein.

7. The State must, within the term of six months, publish at least once in the Official Gazette and in another nationwide daily newspaper, Chapter VII - Proven Facts - of the instant Judgment, without its footnotes, as well as the operative paragraphs herein, as set forth in paragraph 249 herein.

8. The State must keep developing an education and training program for staff in health care, psychiatry, psychology, nursering, and for any person involved in mental health services, in particular, covering the principles that govern treatment to patients with mental illness, according to international standards and the provisions of the instant Judgment, as set forth in paragraph 250 herein.

9. The State must pay in cash to Albertina Viana-Lopes and Irene Ximenes-Lopes-Miranda, within the term of one year, as compensation for pecuniary damage, the amount fixed in paragraphs 225 and 226 herein, as set forth in paragraphs 224 to 226 herein.

10. The State must pay in cash to Albertina Viana-Lopes, Irene Ximenes-Lopes-Miranda, Francisco Leopoldino Lopes and Cosme Ximenes-Lopes, within the term of one year, as compensation for non-pecuniary damage, the amount fixed in paragraphs 238 herein, as set forth in paragraphs 237 to 239 herein.

11. The State must pay in cash, within the term of one year, as costs and expenses incurred in the domestic proceedings as well as in the international proceedings under the Inter-American system of protection of human rights, the amount fixed in paragraph 253 herein, which shall be delivered to Albertina Viana-Lopes, as set forth in paragraphs 252 to 253 herein.

12. The State shall monitor full compliance with this Judgment and shall consider the instant case closed upon full compliance by the State with the provisions therein. Within the term of one year as from the date of service of the instant Judgment, the State must submit to the Court a report on the measures adopted in compliance therewith.

Judge Sergio García-Ramírez submitted his Reasoned Opinion to the Court and Judge Antônio Augusto Cançado-Trindade submitted his Separate Opinion to the Court, which are herein included.

Drafted in Spanish and Portuguese, where the Spanish version prevails, in San José, Costa Rica, July 4, 2006.

Sergio García-Ramírez
President

Alirio Abreu-Burelli

Antônio A. Cançado Trindade

Cecilia Medina-Quiroga

Manuel E. Ventura-Robles

Diego García-Sayán

Pablo Saavedra-Alessandri
Secretary

So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

**REASONED OPINION OF JUDGE SERGIO GARCÍA-RAMÍREZ
TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS
IN THE CASE OF XIMENES-LOPES V. BRAZIL OF JULY 4, 2006**

1. GENERAL AND SPECIAL RIGHTS

1. Throughout its ever growing and more comprehensive case law, the Inter-American Court has addressed the assessment and identification of the rights and freedoms of individuals and group members, either as a group itself or as a community, as well as the obligations and duties of the State in certain specific hypothetical cases. Reference to the latter has served to largely refine the case law of the Court at the service of individual rights in a realistic scenario, including many different circumstances and multiple needs and expectations.

2. Universal rights and guarantees, which are of a basic nature and have been “thought” to reach everyone, should be complemented, aligned and lined up with the rights and guarantees exercised in relation to the members of a group, sector or specific community, that is to say, that they should be meaningful to some or many specific individuals, but not to all. This idea stems from the fact that behind the generic concept of human being as a member of a uniform society –seen as an abstract concept based on homogenous subjects- there may be a “case” or “cases” of human beings of flesh and blood, with distinct characteristics and particular demands.

3. It is indeed the task of the State –as it derives from its origin and justification- to preserve the rights of every person subject to its jurisdiction, which is a broad concept that for sure goes beyond territorial issues, in compliance with the actions and omissions that best serve to this protection in order to favor the enjoyment and exercise of the rights. To this respect, the State should undoubtedly avoid inequality and discrimination practices and provide a universal protection to the individuals who are subject to its jurisdiction, regardless of individual or group conditions that may leave them aside of the general protection or may impose on them –either *de jure* or *de facto*- additional levies or specific restrictions.

2. MEANS OF COMPENSATION

4. It is equally incumbent on the State to provide, when factual inequality places the right holder in a difficult situation – that may result in the absolute impossibility to exercise the rights and freedoms-, the means of correction, leveling, compensation and balancing that may allow the individual to have access to said rights, either under relative, conditional or imperfect circumstances that the State protection intends to redress. These means embody other reasonable, pertinent and efficient “protections” aimed at broadening the opportunities and enhancing the quality of life that, in turn, pave the way to the natural evolution of the individuals, instead of restricting or eliminating it under the guise of assistance and protection.

5. (Advantage or) disadvantage factors are many in number. Some derive from the particular conditions of the individual –like health, age or sex- others, from social circumstances –like indigenous, foreigner or inmate status-. The State is under a duty to speak out against said differences, weed out the source of discrimination and give adequate support to the individuals under undesirable conditions –from “cradle

to grave," if necessary, as the old welfare state slogan goes- trying to prevent, mitigate and redress the consequences.

3. THE STATE AS "GUARANTOR"

6. In addressing these issues, it is worth analyzing the position of guarantor of the state. Article 1 of the American Convention states that the State must (recognize), respect and ensure the rights and freedoms enshrined in the Pact of San Jose, Costa Rica. In Article 2, it also sets out that the State must remove the obstacles that hinder the exercise of said powers and adopt such measures as may be necessary to allow every person to effectively gain access to them.

7. In this regard, the exercise of the powers that shape the jurisdiction of the State to which the persons are subject –in their capacity as nationals, citizens, residents, refugees, etc.- ratifies the position of guarantor of the State in relation to the persons under its jurisdiction, allows for fixing the scope and characteristics of specific care and protection practices inherent to said capacity and must be confronted with actual authoritative and protective means.

8. Whoever acts as guarantor for something or of somebody, that is to say, whoever undertakes to secure protection of certain interests in favor of certain persons, undertakes the obligation to confer said interests and persons special care, compatible with the scope of the powers, as set out in the law, an agreement or any other source of guarantee. The State is, generally speaking, the guarantor of the persons under its jurisdiction. The duty of care of the State varies, according to the circumstances, due to several reasons: from the general guarantee of peace and security to the strict duty of care relative to the management of primary utility services and assistance to individuals who are unable to take care of themselves or whose capacity to do so is seriously impaired. The duty of care of the State-guarantor varies then in quality and intensity, according to the characteristics of the secured interest and the interest holder. In the same line of thought, the provision of health care services, which is the subject matter of the judgment with which this *Opinion* concurs, demands a higher, if not the highest, protection.

9. The State acts as guarantor of the rights and freedoms of the persons under its jurisdiction as set forth in domestic fundamental laws –the political constitution, in particular- and in international decisions on human rights. The position of guarantor does not entail releasing individuals from their liability for their decisions and acts; on the contrary, it entails providing the means to help them decide and act the best way possible, develop their own capabilities and fulfill their dreams. The State ensures the enjoyment and exercise of rights and freedoms through omissions and acts. The guarantor function of the State, that gained strength through the protection of first generation rights and their resulting observance by the State – normally, by an omissive observance- evolved into a major function through the protection of second generation rights giving rise to a demand for public provision and promotion.

4. PERSONAL AUTONOMY

10. Obviously, the development of every human being is not dependant upon the promotion and care provided by the State. From a general standpoint, every human

being has, maintains and develops, in a broad sense, the capacity to conduct his own life, to choose the best means to do it, to use the means and tools that serve to that end, selected and used with autonomy – as a sign of maturity and a condition of freedom- and even to legitimately resist or reject any undue influence and aggression inflicted on him. This reinforces the concept of autonomy and discards any oppressive temptation that may be disguised under an illusive tendency to benefit the individual, determine what is best for him and foresee or mark his decisions.

5. SPECIFIC TYPES OF PROTECTIONS

11. On the other hand, from a specific standpoint, the State undertakes particular obligations –based on group, specific or individual guarantees, in contrast to universal or general guarantees- in relation to particular groups – or to members of certain groups which identify themselves with their own lifestyle, needs and expectations. In those cases, the position of guarantor of the State in relation to the individuals subject to its jurisdiction adopts peculiar features, which become inescapable for the State and give rise to individual rights.

12. Said features of the State’s guarantor position, or of its capacity as guarantor of effective access to rights and freedoms, are usually manifest in political decisions of a general nature that intend to set a balance in the society and foster social justice. This becomes apparent, for example, when the special guarantying function is exercised in favor of sectors with less economic or political influence, such as workers, farmers, indigenous communities, children and adolescents, and their very substantial variations.

13. On the other hand, the special guarantor position of the State may be analyzed in the cases deriving from a legal situation or biopsychology determination that makes the State undertake –on its own initiative or by decentralized and subsidiary ways- extra direct protection and/or governance duties, which consequently translate as a limitation on the essential autonomy of every individual resulting in propitious –and demanding- conditions for immediate State action. The cases of deprivation of personal freedom that entails the violation of said right, among others –notwithstanding any claim to the contrary- with punitive (inmates), therapeutic (patients) or educational (prison students) purposes, fit into this heterogeneous category. In those cases, the legitimate intervention of the State varies in scope and intensity and, therefore, the degree of liability and authority of the State varies in proportion to the limitation –depending on natural elements and authoritative powers- on the freedom and the individual’s capacity to define, organize and conduct his own life.

6. MENTAL ILLNESS, AUTONOMY AND INCAPACITY

14. It seems apparent that the most intense form of limitation on personal self-governance becomes visible in persons with mental illness –there are, of course, many illness categories that give rise to different personal situations-, who are frequently deprived of the power to make the most basic decisions while held in custody for severe disorders, and who are subject to the almost absolute authority of physicians and custodians while confined in an institution with rigorous rules and regulations. On the contrary, despite there are noticeable limitation factors, the

situation is completely different in other cases: not even regarding to wrongdoers, who still have some more or less elemental degree of autonomy, based on their lucidity and the surrounding environment –though sometimes physically, socially and institutionally restricted-. The history of autonomy – or rather, heteronomy- and subjection practices in prison runs along the history of the institutions for people with mental illness, who belong to a marginalized world. Criminals and the “possessed” go hand in hand in this abstruse narration.

15. Consequently, mentally ill persons who are confined in State institutions frequently receive less support than other persons, live in a state of defenselessness and face two-fold discrimination –as a result of social exclusion and due to the rarity of their illness itself-, are incompetent to exercise an atypical form of autonomy – which sometimes lacks direction and sense and is prone to surrendering to danger and risk- and, based on the foregoing, demand a more accurate focus of the guarantor position of the State on most basic issues of manhood.

16. The Inter-American Court has assessed the special intensity of the guarantor position of the State regarding to inmates of institutions under strict rules of conduct, unflinchingly imposed, intended to govern all the time almost every event of their life, as it happens in prisons and institutions for children and adolescents. In the *Case of Ximenes-Lopes*, the Court addresses for the first time the situation of an inmate with mental illness and the guarantees -of preservation and relative exercise of irrevocable rights- provided by the State: either directly or by delegation of a service, that places service-related duties in a different person without annulling the public liability for the efficient and respectful provision of the *lex artis* –that governs the duty of care in the provision of psychiatric services-, the specific rules of ethics applicable to patient treatment in general and psychiatric patients in particular, and the undertaking of control and assistance obligations relative to the performance and results of the service.

17. Any person with mental illness who experiences total deprivation of his autonomy – including both logical discerning capacity and self-governance- and is absolutely dependent on the person in charge of his care –the direct or indirect State agent, either on its own or by delegation- becomes an individual in need of full attention, more than anybody else subject to the jurisdiction of the State, and the guarantor position of the State becomes more imperative and accurate, demanding and comprehensive than under different circumstances.

7. THE “ENCOUNTER” BETWEEN THE PERSON WITH MENTAL ILLNESS AND THE STATE

18. As the State sustains a broader liability, which demands a more comprehensive–complete and absolute- response, the State that assists psychiatric patients is expected to grant a more comprehensive, intense and sustained guarantee of the rights of private individuals regarding to the conditions that would allow them to exercise those rights on their own: life, food, health, relationships, among others. This guarantee spreads in all naturally practicable directions: either by omission –for example, respect for personal integrity, protection against illegal experiments and mistreatment- or by action and provision –of conditions that mitigate misfortune and foster, whenever possible, health recovery or pain and anguish relief.

19. As in other cases where the Inter-American Court took notice of and made known deplorable prison conditions, the instant case addresses the issue of the atrocious state of some –how many?- institutions for people with mental illness. Any form of resistance by the affected persons is generally deemed as a riot –instead of a democratic form of dissent- and suppressed with strictness. Protests, if any, by inmates, beyond the mist of absence and surprise, may lead to an even worse destiny: a state of absolute indifference or “therapeutic” disciplinary actions that consist, in substance, in senseless severe punishment or intimidation. The reaction of a prison inmate is the consequence of an “ill feeling”; while the person with mental illness acts out of “insanity”, which is, by definition, irrational and dysfunctional.

20. I put a stress on the fact that the encounter between the alleged or purported criminal and the State, as fact finder and law enforcement agent, reveals the most obscure region of human rights domain: where “crime” and “law” meet, as in a predictable confrontation. However, speaking of human rights domain, the mist surrounding the encounter between the State as therapist and the person with mental illness is usually denser: where sense and stupidity -lucidity and insanity- collide. The outcome is also predictable.

21. Between a human being with mental illness and the powerful State –vested with the physical force of a guardian and the scientific knowledge of a therapist- the human rights line lies beside the willingness of the guarantor-State to comply with its constitutional obligations. The Judgment addresses some shades of this issue when it states that “this intrinsic imbalance in power between hospitalized patients and the persons having authority over them is usually greater in psychiatric institutions.”

22. One might reasonably, though not necessarily, conclude that the issue has been extensively studied and documented, in early times, in many contexts – the circumstances surrounding the encounter of a person with mental illness and those who interact with him like custodians, therapists and authorities, while held in an institution that welcomes the generally accepted practices of mental institutions, which are governed by detailed rules and entail the exercise of full authority by the custodian and the least autonomy by the ward who, by definition, lacks capacity to make considerations, enter into deliberations and do forecasts on which personal autonomy is reasonably based. Therefore, it is of utmost importance that the practices in those institutions –and, in general, the relationship among the institution, the therapist and the inmate- be subject to control and disciplinary measures that are implemented with fluency, competence, consistency and responsibility.

8. NULLUM CRIMEN NULLA POENA SINE LEGE PRAEVIA

23. As far as psychiatric treatment is concerned –institutional treatment, in particular, and home or walk-in treatment, during which close friends and relatives get involved- the principle of *nullum crimen nulla poena sine lege praevia*, applicable to every form of detention and the right to be safe, adopts a special meaning. Nowadays –as in earlier times-, the law outlines the conditions for the detention of persons who commit crimes and infringements and sets out the limits and conditions of confinement. These are elements of the *nullum crimen nulla poena sine lege praevia* doctrine, which have been recurrently overlooked or neglected.

24. The requirements for confinement of persons with mental illness are not stated with such detail –even though the rules, principles and statements on this issue have certainly multiplied- pretending that their freedom or confinement, justified by the need for treatment –a controversial concept when used in relation to prison inmates, but that is broadly accepted in the cases of persons with mental illness- is less worthy of protection of the right to personal freedom. On the contrary, said right only deserves a lighter protection when there is a justification that so mandates, based on the law, and not only on the personal opinion of the therapist, relative or administrative authority.

25. Owing to their human condition and in spite of their suffering, persons with mental illness enjoy rights that can only be legitimately affected by legally founded and duly taken measures, consistent with the characteristics of the suffering and the need for treatment, which are as reasonable and moderate as practicable and aim at relieving pain and foster well-being. Criminals or minors, who eventually managed to escape the rule of force –or, at best, the rule of mere benevolence- to live under the rule of law and reason enjoying the right to exercise lawful powers and have access to guarantees, have not evolved to the same extent, if any, and with the same intensity, whatever it might be, as persons with mental illness who are more exposed to the restrictions and decisions of custodians and professionals.

9. DELEGATION OF SERVICES AND STATE RESPONSIBILITY

26. The events that resulted in the death of Ximenes-Lopes unfolded while he was held under therapeutic treatment in a private health institution that acted, in turn, by delegation of the State. The observance of the universal right to health protection, which has evolved both in the national and the international levels, forms the operating framework of the health system in which public and private agents interact under the supervision of the State at different levels. This is the basis of the different treatment models that are subject to administrative procedures: from strict public centralization to free provision of professional services.

27. It is not my purpose –as it was not the Court’s purpose in the Judgment with which this Opinion concurs- to discuss those models and assess their advantages and disadvantages. It is worth noting that, however, in line with the statements of the Judgment, when the State delegates the provision of services that have been inherently placed under its domain –because they involve social rights protected by the State- it does not completely dissociate itself from –in other words, it is not released from liability- the assistance provided to the person whose care has been delegated to a third party. Said delegation is public and the relationship between the delegating State and the delegatee therapist develops within the public order context. The private therapist carries out in action the tasks that are incumbent upon the State and for which the State is completely liable; that is to say, it answers for them, irrespective of the fact that the delagatee entity or subject is also answerable to the State.

28. It is possible to draw a line between mere supervision –which does not entail, however, absolute detachment or institutional indifference- on the part of the State over private entities, either individual professionals or health institutions, that render services to users (patients) under a private law relationship, though based on a public or social interest, and the material liability of the State when it takes part in a private entity, by mutual agreement and with it, that operates under a public law

relationship with the delegating State, which relationship goes beyond the service user beneficiary of said relationship.

10. ACKNOWLEDGMENT OF RESPONSIBILITY

29. In the *Case of Ximenes-Lopes*, the defendant State acknowledged, in different terms, the events that have been attributed to it and their characteristics. The acknowledgment consisted in express admissions of fact and a partial acknowledgment of international responsibility. The Court has shown appreciation for the State's stance, which has both substantive and procedural repercussions and smoothes the way for an upward trend in understanding that favors settlement between the parties. Moral and legal issues surrounding this procedural behavior stand up to scrutiny. Similar acknowledgments, which have been assessed by the Court, were made during the same session period of the instant case, as in the two cases submitted in July, 2006: *Case of the Ituango Massacre* (Colombia) and *Case of Montero-Aranguren* (Venezuela).

Sergio García-Ramírez
Judge

Pablo Saavedra-Alessandri
Secretary

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I appear to set my opinion for the adoption, by the Inter-American Court of Human Rights, of this Judgment in the case of *Ximenes-Lopes v. Brasil*. Considering the particular relevance of the subject matter analyzed by the Court, I am obliged to set forth, in this Separate Opinion, my personal considerations on the matter discussed by the Court in this Judgment, as the arguments of my position. And I do so, as usual in this Court, under the merciless pressure of time, as I only had a few hours for the elaboration and presentation of this Opinion. For the above mentioned purpose, I shall refer, in this Separate Opinion, to the following items: a) focus on the victims suffering in International Human Rights Law; b) the acknowledgment of international liability by the Respondent Government; c) the right of access to justice *lato sensu* in the inevitable dissociability between Articles 25 and 8 of the American Convention; d) the right of access to justice as a right to a prompt response by the judicial system; e) the direct applicability of the American Convention in the domestic law and guarantees of non-repetition of libelous facts; and f) the need to enlarge the material content of *jus cogens*.

I. Focus on the Victims Suffering in International Human Rights Law.

2. There are cases of human rights violations which evoke tragedies, revealing the perennial presence of the latter, as inherent to human condition. To remember two precedents, in my Separate Opinion in the case of *Bámaca Velásquez v. Guatemala* (merit, Judgment of November 25, 2000) before this Court, the famous tragedy of Sophocles' *Antigone* came to my mind (paragraphs 8-9). In my Separate Opinion in the case of *Bulacio v. Argentina* (merit and reparations, Judgment of September 18, 2003) I referred to Ajax and to Sophocles's *Philoctetes* (paragraphs 8 and 16), to the desperation of Hecuba, by Euripides (paragraph 22), to Aeschylus's *Agamemnon* (paragraph 26) and the *Eumenides* (the last play of the *Oresteia* trilogy), also by Aeschylus (paragraph 32).¹⁶³

3. This case *Ximenes-Lopes v. Brasil* also includes tragic ingredients which immediately remind me of the imperishable and so topical Greek tragedies. I was reminded, e.g., by the testimonial declaration of the victim's sister (Mrs. Irene Ximenes-Lopes Miranda), during the public hearing on the *cas d'espèce* before this Court on November 30 and December 1, 2005. The said moving declaration of Irene reminded me of the *Electra* by Sophocles and by Euripides. Euripides's *Electra* was much more inclined towards private justice, while Sophocles's *Electra* surrenders, at an earlier time and to a much greater extent, to pain as a result of the notice (although false) of the death of her brother.

4. Sophocles's *Electra* faints when she sees in the urn the ashes she thought were her brother's, Orestes, (they were not), and desperately remembered her affection for him (without knowing that he was alive), before seeking for private justice, which was the usual practice at the time. When touching the said ashes, in tears she regretted:

¹⁶³ . Euripides, *Electra and Other Plays*, London, Penguin, 2004 [reed.], pp. 131-174

"(...) Now I carry thy poor dust in my hands; but thou wert radiant, my child, when I sped the forth from home! Would that I had yielded up my breath, ere, with these hands, I stole thee away, and sent thee to a strange land, and rescued thee from death! (...) But now, an exile from home and fatherland, thou hast perished miserably, far from thy sister (...). at the hands of strangers, hapless one, thou hast had those rites, and so art come to us, a little dust in a narrow urn. Ah, woe is me for my nursing long ago, so vain, that I oft bestowed on thee with loving toil I For thou wast never thy mother's darling so much as mine; nor was any in the house thy nurse but I; and by thee I was ever called 'sister. But now all this hath vanished in a day, with thy death; like a whirlwind, thou hast swept all away with thee. (...).

(...) Ah me, ah me! O piteous dust! Alas, thou dear one, sent on a dire journey, how hast undone me,- undone me indeed, O brother mine! Therefore take me to this thy home, me who am as nothing, to thy nothingness, that I may dwell with thee henceforth below; for when thou wert on earth, we shared alike; and now I fain would die, that I may not be parted from thee in the grave. For I see that the dead have rest from pain.."164

5. The luck of Irene, sister of Damião Ximenes-Lopes, was worse than that of *Electra*'s: she also fainted when she knew that her brother, who left home to be taken care of by social "services" in a "resting" home, died there, and she also remembered her affection for him:

"(...) As his older sister, in a way I took care of him, (...) I accompanied him, took him to my house, visited him. (...) My relationship with him was the best possible one, more than that of a sister, a little bit of a mother too.

(...) I saw him already in the coffin, prepared to be buried. (...) I could see several signs of torture. (...) He had been beaten up. (...)

[All this] shocked me, terrified me, I had so many nightmares (...). I was terrified (...). I felt pain in the chest, but it was not a heart breaking pain, it was soul breaking. (...)

[What happened] even today has effect, (...) six years of desperation for justice. (...) I started a big struggle for justice (...). I had three years of depression, (...) I traveled a lot looking for justice (...)."165

6. Irene soon and effectively decided, beside the grave of her beloved brother, to depart determined to find public justice, as it is the usual practice at her time, our time, which so far, with the adoption of this Judgment of the Inter-American Court, she had not found. As she said before this Court,

"(...) On the day my brother was buried in the cemetery, I kneeled on his coffin and sworn that my soul would not rest until

¹⁶⁴. <http://drama.eserver.org/plays/classical/sophocles/electra.txt>

¹⁶⁵. Inter-American Court of Human Rights, *Transcript of Public Hearing of November 30, 2005 and December 1, 2005 in the case of Ximenes-Lopes v. Brasil*, pp. 23 and 27-28.

justice had been done, and I have been looking for justice for six years. (...) Now my soul can rest, I haven't left my brother's death unpunished, I claim for justice."¹⁶⁶

This Judgment rendered by the Inter-American Court, to be duly fulfilled by the Brazilian State, vindicates her suffering and satisfies her thirst for justice. It also reveals the relevance of international jurisdiction in our days.

7. Electra's and Irene's stories are totally different, and they took place in times separated by centuries. Nevertheless, they present the tragedy of human condition as a common element, before the persistence of indifference and cruelty, stressed in the treatment of the more vulnerable ones, and also the desperate and despairing search for justice (then private, today public). They unfold the inscrutable presence of tragedy in the mysteries around life, which some have tried to simplify characterizing it as fate. Human suffering hopelessly continues to be a sad trace of human condition along the centuries. With particular foresight, Sophocles warned, already in the V Century B.C., in his *Oedipus the King*¹⁶⁷, that we must never say that someone is happy until the time he has overcome the extreme limit of a painless life.

8. And the evolution from private justice (of the antique Greek) to public justice (of the "modern" and "post-modern") seems to progress unfinished, acquiring a mainly ritualistic feature, contaminated by the erosion and "outsourcing" of the public services and by a merely formalist justice. To this we must add the regrettable transformation of public assets as health and education into goods. Damião Ximenes-Lopes had a violent death when he was entrusted to the public social "services" and when he was confined to a "resting" home, the one in Guararapes.

9. The violent death of defenseless Damião, who was looking for medical treatment, had a devastating effect in the life not only of his sister Irene, but also in the life of his next of kin. According to Irene's account before the Court, Cosme, Damião's twin brother, considering the proximity of the bond with the victimized brother, "was in shock" when he learned about Damião's death. However, she added, "until today Cosme does not know the details of the torture and the violence; we omitted them because that would cause too much suffering to him and we wanted to preserve his health."¹⁶⁸ In other words, he was duly preserved from the truth, which under certain circumstances proves to be necessary, as the tragedy of knowledge of the human condition may be sometimes unbearable, mainly for those more vulnerable or sensitive.

10. The mother's life was "completely ruined", she is always remembering the death of her son Damião, "until today she is depressed and says that she wants to die."¹⁶⁹ Mother and father were already separated, but they have preserved the family bonds of affection with the children; the father, immersed in "deep suffering"

¹⁶⁶. *Ibid.*, p. 28, and regarding the liability of the State, cf. p. 32.

¹⁶⁷. In the piercing final phrase - verses 1529-1530.

¹⁶⁸. Inter-American Court of Human Rights, *Transcript of Public Hearing...*, *op. cit. supra* n. (3), p. 27.

¹⁶⁹. *Ibid.*, p. 28.

and "desire of revenge" by the death of Damião, sought "spiritual help" in an Evangelical Church, which "relieved" him.¹⁷⁰ Also, human suffering has an intergenerational dimension, passing from parents to children, -as already noted in the Genesis book, which predicts that all human beings shall know good and evil (3,5).

11. The shadows of human existence are retaken by the Book of Job, where the oppressors give orders to the oppressed using violence (24.2-4.9 and 24.5-8.10-12ab). When Damião died, his sister Irene had a newborn baby girl. As a consequence of the events occurred, the baby stopped being breast-fed; as pointed out by Irene before this Court, "due to the emotional shock, I spent weeks without feeding her, and my breasts did not produce milk; my daughter was deprived of natural food and had to take artificial food."¹⁷¹ Human suffering passes from generation to generation, from the beginning to the end of life. As already predicted by the Ecclesiastes,

"... and behold, the tears of such as were oppressed, and they had no comforter, and on the side of their oppressors there was power, but they had no comforter" (4,1).

12. Sophocles sensed it well, in the verses of *Antigone* and also of *Oedipus the King*: the first stated that

"Thrice happy are they who have
never known disaster!
Once a house is shaken of heaven, disaster
Never leaves it, from generation to generation. (...)
Then pray no more; from suffering that has been
Decreed no man will ever find escape."¹⁷²

And the second inquired:

"Has any man won for himself
More than the shadow of happiness,
A shadow that swiftly fades away?"¹⁷³

13. As noted by Edgar Morin in the 20th Century, the history of human culture itself is built on acts of cruelty, not there being a single testimony of culture which is not of barbaric acts.¹⁷⁴ Which led him to add that:

"Como la propia vida, el hombre se desenvuelve en el azar,
contiene el azar en si mismo, está hecho para encontrarse con el azar,

¹⁷⁰. *Ibid.*, pp. 28.

¹⁷¹. *Ibid.*, p. [9].

¹⁷². Verses 584-587 and 1335-1337.

¹⁷³. Verses 1189-1191. - Texts *in*: Sophocles, *Antigone - Oedipus the King, Electra*, Oxford, University Press, 1998 [reed. Oxford World's Classics].

¹⁷⁴. E. Morin, *El Hombre y la Muerte* (1970), 4th edition, Barcelona, Ed. Kairós, 2003 [reed.], p. 53.

combatirlo, domesticarlo, escapar a él, fecundarlo, jugar con él, correr el riesgo que supone, aprovechar las oportunidades...

(...) La vida está siempre al borde del desastre. La muerte está en el universo físico-químico en el que la vida corre constantemente el riesgo de perecer, pero en el que se ha formado, tejido, desarrollado. La muerte está en la indeterminación micro-física, pero indeterminación que al mismo tiempo está en la fuente de las mutaciones y las creaciones, de toda creación. La mutación, fuente de la muerte, es también fuente de la vida. Lo desordenado, ese caos subterráneo y permanente, es a la vez lo que crea y lo que destruye.

(...) La muerte, para el hombre, está en el tejido del mundo, de su ser, de su espíritu, de su pasado, de su futuro".

14. However, even deprived of happiness and abandoned to fate (as, in this case before this Court was Mr. Damião Ximenes-Lopes, who, entrusted to social "services" in a "resting" home, there he found violent death), the human being cannot give up the fight for justice, as long as he maintains the capacity of indignation. On the other hand, he shall be deprived not only of happiness, but also of the search for the sense of life, although brief and ephemeral. Another lesson that can be extracted from Electra (and also, I add, from the reaction of Irene Ximenes-Lopes), is that "life is much more comfortable when submitted to the worst injustice and if it is forgotten that it is unjust."¹⁷⁵ Indeed, it is more comfortable, but also entirely senseless. Therefore, the inevitability of suffering before human cruelty.

15. In my *Tratado de Direito Internacional dos Direitos Humanos*, I allow myself to stress precisely the projection of human suffering in time and the *focus centered on the victims* in the Human Rights International Law. As I state therein, *inter alia*, regarding that matter:

"Human Rights International Law, as essentially inclined to the victim condition, has contributed, to a great extent, to return them the core position they have today in the legal world, - which is its *raison d'être*. The focusing on the victims in the conceptual universe of Human Rights International Law, not enough analyzed by the legal contemporary doctrine until now, is of paramount relevance and it entails practical consequences. Indeed, it is the very essence of Human Rights International Law, as it reaches its plenitude in the protection extended to the victims. But the *rationale* of its protection rules and regulations is not exhausted with the protection granted to people already victimized. Human Rights International Law, by its sole existence, universally recognized in our time, protects human beings also by means of the prevention of victimization. The scope of its *corpus juris* must be appreciated also from that perspective. (...)

Human Rights International Law thus contributes to the process of *humanization* of International Law.¹⁷⁶ The treatment given to human

¹⁷⁵. Simone Weil, *La Fuente Griega*, Madrid, Ed. Trotta, 2005 [reed.], p. 66.

¹⁷⁶. As we repeatedly pointed out in our Separate Opinions in Judgments of the Inter-American Court of Human Rights, as, *inter alia*, in the cases of "Meninos de Rua" (Street Children) (Villagrán Morales et al. v. Guatemala (Reparations, 2001), of Blake v. Guatemala (Merit, 1998, and Reparations, 1999), of Bámaca Velásquez v. Guatemala (Merit, 2000, and Reparations, 2002), as well as in our Concurring Opinion in the Inter-American Court of Human Rights Opinion on the Right to Information on Consular Assistance within the Scope of Due Process of Law Guarantees (1999).

beings by the public power is no longer alien to International Law. On the contrary, it is a part thereof, as the rights to which every human being is entitled derive directly from International Law. Individuals are, in fact, subjects of domestic as well as international law. And they have a central position in the scope of Human Rights International Law, whether or not they are victims of violations of their internationally consecrated rights."¹⁷⁷

II. Acknowledgment of International Liability by the Respondent Government.

16. Regarding to the preliminary considerations of this Judgment in the case of *Ximenes-Lopes*, we must not disregard that the Inter-American Court pondered the acknowledgment of international liability by the Respondent State as a "positive contribution to the development of this process and to the enforcement of the principles that inspire the American Convention in Brazil" (para. 80), particularly regarding the acknowledgment of the violation of Articles 4 and 5 of the Convention (paragraphs 119 and 122). With that, the controversy regarding certain facts of the case was over, although the Court wouldn't have been naturally exempted from proceeding, as it was the case, according to its own assessment of the facts.

17. Moreover, as it arises from the public hearing before this Court of November 1 and December 1, 2005, the parties involved showed a constructive spirit of procedural cooperation and common sense and professionalism when forwarding the documentation to the Court and during the presentation of their oral arguments. This allowed the Court to fulfill its duty of effective response by the judicial system within a reasonable time under the American Convention,- in contrast with the events occurred in the scope of domestic law, - which stresses the relevance of international jurisdiction.

18. Regarding the correct ruling by this Court of the preliminary objection filed by the Respondent Government, there is no need to entirely repeat my concurring opinion in the former Judgment of November 30, 2005 in this case of *Ximenes-Lopes*, but only the last paragraph, where, regarding to the need of a greater degree of reflection on the improvement of the proceedings under the American Convention and a clearer explanation of the role of the Commission under the Convention, I stated:

"My opinion regarding this matter is very clear, and it is recorded in the Protocol Project for the Human Rights American Convention (*Projeto de Protocolo à Convenção Americana sobre Direitos Humanos*) where I submitted, in the name of the Inter-American Court, before the competent bodies of the Organization of American States (OAS) in 2001¹⁷⁸, which sets forth the human being

¹⁷⁷. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre, S.A. Fabris Ed., 2003, pp. 434-436, paras. 48 and 50.

¹⁷⁸. A.A. Cançado Trindade, *Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección*, vol. II, 2nd. ed., San José de Costa Rica, Inter-American Court of Human Rights, 2003, pp. 1-1015.

right to international justice, to the automatically compulsory jurisdiction of the Inter-American Court, to the jurisdictionalization of the Inter-American system of protection and to the retention, within the scope of the latter and at present, of the role of district attorney by the Inter-American Convention" (para. 3).

III. The Right Of Access To Justice *Lato Sensu* In The Inevitable Dissociability Between Articles 25 And 8 Of The American Convention

19. Next, I will refer to one of the central issues analyzed by the Court in this Judgment in the case of *Ximenes-Lopes* (and treated in its *jurisprudence constante*, and in several Opinions that I have rendered in adversarial cases submitted before this Court), that is, the access to justice *lato sensu*, based on the inevitable dissociability - which I have supported for years in this Court - between Articles 25 and 8 of the American Convention. With regard to that issue, in my recent and long Separate Opinion in the case of *Massacre of Pueblo Bello v. Colombia* (Judgment of January 31, 2006) I referred, in a logic sequence, to the broad scope of the general duty of guarantee (Article 1(1) of the American Convention) and to the *erga omnes* protection duty (paras. 2-13), to the genesis, ontology and hermeneutics of Articles 25 and 8 of the American Convention (paras. 14-21), to the irrelevance of allegation of domestic law difficulties (paras. 22-23), to the right to an effective remedy in the jurisprudential construction of the Inter-American Court (paras. 24-27); then I examined the inevitable dissociability between access to justice (right to an effective remedy) and the guarantees of due legal process (Articles 25 and 8 of the American Convention) (paras. 28-34), and came to the conclusion that such impossibility of dissociation, consecrated in the Court's *jurisprudence constante* to date (paras. 35-43), constitutes "a legal heritage of the Inter-American system of protection and of the people of our region," reason for which "I firmly oppose to any attempt to deconstruct it" (para. 33).

20. In the same Separate Opinion in the case of *Massacre de Pueblo Bello*, I supported the above mentioned impossibility of dissociation between Articles 25 and 8 of the American Convention as an "intangible jurisprudential advance" (paras. 44-52).¹⁷⁹ Then I referred to the right of access to justice *lato sensu*, remarking that:

"In the *Reports* I presented, in my then capacity as President of the Inter-American Court, to the competent bodies of the American States Association (ASO), e.g., on April 19, 2002 and on October 16, 2002, I defended my understanding in the sense of the broad scope of the right of access to justice at international level, the right of access to justice *lato sensu*.¹⁸⁰ Such a right not only boils down to the formal

¹⁷⁹. In the same Concurring Opinion, I also referred to the overcoming of difficulties regarding to the right to an effective remedy in the jurisprudential construction of the European Court of Human Rights (paras. 53-59).

¹⁸⁰. Cf. also A.A. Cançado Trindade, "El Derecho de Acceso a la Justicia Internacional y las Condiciones para Su Realización en el Sistema Interamericano de Protección de los Derechos Humanos", 37 *Revista del Instituto Interamericano de Derechos Humanos* (2003) pp. 53-83; A.A. Cançado Trindade, "Hacia la Consolidación de la Capacidad Jurídica Internacional de los Peticionarios en el Sistema Interamericano de Protección de los Derechos Humanos", 37 *Revista del Instituto Interamericano de Derechos Humanos* (2003) pp. 13-52.

access, *stricto sensu*, to the judicial instance (both domestic and international), but it also encompasses the right to the prompt response by the judicial system, and it underlies in interrelated regulations of the American Convention (as Articles 25 and 8), apart from permeating the domestic law of the States Party.¹⁸¹ The right of access to justice, with its own legal content, means, *lato sensu*, the right to obtain justice. It is thus configured as the right to the *realization* of justice itself.

One of the main elements of that right is precisely the direct access to a competent court through an effective and quick remedy, and the right to be immediately heard by said court – independent and unbiased – at both national and international level (Articles 25 and 8 of the American Convention). As I remarked in a recent work, here we can see a real *right to Law*, that is to say, the right to a legal system – both at national and international level – which effectively safeguards the fundamental rights of the human being¹⁸² (paras. 61-62).

21. Finally, in the same Separate Opinion in the case of *Massacre de Pueblo Bello*, I repeated my understanding in the sense that the right to Law constitutes a “*jus cogens* imperative:”

"The inevitable dissociation between Articles 25 and 8 of the American Convention (*supra*) I support leads to characterize access to justice as part of the *jus cogens*, understanding said access as the *complete realization* of justice, that is, taking the intangibility of all legal guarantees in the sense of Articles 25 and 8 taken *jointly* as part of the *jus cogens*. There can be no doubt that the fundamental guarantees, common to International Human Rights Law and International Humanitarian Law,¹⁸³ which are of universal vocation as they apply in all and every circumstance, form an imperative right (of the *jus cogens* scope), and entail *erga omnes* protection obligations.¹⁸⁴

Subsequently to its historical Consultative Opinion No. 18 on the *Legal Status and Rights of Undocumented Migrants* of 2003, the Court could and should have already taken this other qualitative step in its jurisprudence. I dare cherish hope that the Court shall do so as soon as possible, if it really carries on with its vanguard jurisprudence, - instead of trying to refrain it, - and it may extend the progress attained with grounds and courage as with the above mentioned Consultative Opinion No. 18 in the line of constant expansion of the *jus cogens* material content” (paras. 64-65).

¹⁸¹. In that sense, cf. E.A. Alkema, "Access to Justice under the ECHR and Judicial Policy - A Netherlands View", in *Afmaelisrit þór Vilhjálmsson*, Reykjavík, Bókaútgafa Orators, 2000, pp. 21-37.

¹⁸². A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brasil, S.A. Fabris Ed., 2002, chapter XX, p. 524, para. 187.

¹⁸³. E.g., Article 75 of Protocol I (of 1977) to the Geneva Convention (of 1949) on International Humanitarian Law.

¹⁸⁴. Cf., also in that sense, e.g., M. El Kouhene, *Les garanties fondamentales de la personne en Droit humanitaire et droits de l'homme*, Dordrecht, Nijhoff, 1986, pp. 97, 145, 148, 161 and 241.

22. To my personal satisfaction, the Inter-American Court, in this Judgment of the case *Ximenes-Lopes*, was unanimously true to its best *jurisprudence constante* regarding the matter, repeating with the highest clarity its understanding of the inevitable dissociability between Articles 25 and 8 of the American Convention, as it unmistakably arises from paragraph 191 of this Judgment, when pointing out that “the effective remedy of Article 25 must follow the process according to the rules of due process of law set forth in Article 8 of the Convention.” Also, the Court reminded that the international liability of the State for the violation of international rules differs from its liability in domestic law (para. 193).

23. Concurrently with the position assumed by the Court in this regard, I cannot help remarking that, as a reply to the questions I posed during the public hearing of November 30, 2001 and December 1, 2005 before the Court, both the Inter-American Commission of Human Rights (CIDH) and the victim’s representatives and next of kin expressed that the best hermeneutics of Articles 8(1) and 25 of the American Convention is the one which effectively and necessarily relates them. The CIDH ruled defending “the integrated combination of due process of law and effective protection of rights of Article 8(1) and Article 25” of the Convention,¹⁸⁵ and the above mentioned representatives affirmed in the same sense that the “clearer understanding of those provisions within the Inter-American system would be to analyze both sections jointly, even because that is precisely what most of the jurisprudence of that Honorable Court does.”¹⁸⁶

IV. The Right of Access to Justice as the Right to the Prompt Response by the Judicial System.

24. The right of access to justice *lato sensu* presumes the understanding that it means the right to a prompt response by the judicial system. Its faithful fulfillment was not verified in the case of *Ximenes-Lopes*, as it is clearly inferred from the facts themselves. For instance, on March 27, 2000, the Public Prosecutor’s representative filed a criminal complaint in Sobral county against four people allegedly involved in the penalties of the Brazilian Penal Code (Article 136(2)) for mistreatment resulting in the death of Mr. Damião Ximenes-Lopes. Two months later, the prosecutors of the Operational Support Center for Socially Discriminated Groups of the Attorney General’s Office expressed to the acting Prosecutor of the case that the supplemental complaint constituted a “legal and institutional imposition;” despite the above, it was only on September 22, 2003, when presenting the closing arguments, that the Public Prosecutor’s Office filed a supplemental complaint to include other two people.

25. The delay in processing the supplemental complaint took even longer, as it was only on June 17, 2006 that the Judge of Sobral County received it. When doing so, he sought to justify his own delay due to the “high volume of work of the 3rd

¹⁸⁵. Inter-American Court of Human Rights, *Transcript of Public Hearing...*, *op. cit. supra* n. (3), p. 125.

¹⁸⁶. *Ibid.*, p. 126.

County Court of Sobral” and to a “30-day holidays” plus “60 days of sick-leave.” That is, the supplemental complaint was received only 8 months and 25 days after having been filed. At that time, the above mentioned County Judge summoned the new defendants and ordered the issuance of an “urgent” summons for the deputy prosecutor and the defense attorneys to submit their closing arguments. That is to say, the so called “urgent” summons was for the others, and not for himself, thus constituting a portrait of the “justice” ritual of the domestic law, not only of the Responsive Government sued before this Court, but also of so many other Governments in different latitudes. At that time, the criminal action of the *cas d’espèce* had already taken more than 4 years and 2 months without even a first instance judgment having been rendered.

26. In the public hearing of November 30 and December 1 before this Inter-American Court on this case, I reminded the acting parties of the State duty of “effective response by the judicial system within a reasonable time” under the American Convention, and mentioned the permanent need – not only as a Brazilian issue, but as an issue concerning every country – “of training national judges in human rights matters, which was evident in this case, both in this hearing and in its examination.¹⁸⁷ Let me remind you of a warning following the same reasoning, expressed a decade and a half ago, during a historic and pioneer Seminar of national mobilization regarding Brazil’s adherence to the American Convention and to the two Human Rights Treaties of the United Nations; at that time, emeritus Professor Washington Peluso Albino de Souza, when referring -during the debates- to the “organization dynamics of the judicial power” focused on the “career” and on the type of “formation” offered by the Law Schools, quite lucidly stated that:

“The need of reality penetration for the knowledge of the Law is rarely fostered. Instead, the dogmatic method is practiced, forming judges who turn to be legalist by conviction. If the law is set aside from reality, the resulting judgment shall also be so. This is how, with full professional certainty, injustice is committed in the name of Law. That explains the lack of confidence in justice of the citizenship in our country, with consequent adages such as “a bad agreement is better than a good lawsuit.”¹⁸⁸

V. Direct Applicability of the American Convention in Domestic Law and Guarantees of Non-Repetition of Libelous Acts.

27. Fortunately, today the *justifiable* in the Respondent Government also count on international jurisdiction for the vindication of their rights. As I said in my opening speech of the judicial year of the European Human Rights Court in 2004, -as a guest for the above mentioned ceremony in Strasbourg, - the two international courts of human rights have made remarkable progress in the realization of

¹⁸⁷. Inter-American Court of Human Rights, *Transcript of Public Hearing...*, *op. cit. supra* n. (3), pp. 123-124.

¹⁸⁸. *Cit. in*: A.A. Cançado Trindade, *A Proteção dos Direitos Humanos nos Planos Nacional e Internacional: Perspectivas Brasileiras* (Minutes of the Brasilia Seminar of 1991), Brasília/San José de Costa Rica, IIDH/F.-Naumann-Stiftung, 1992, p. 170 (intervenção do Prof. Washington P. Albino de Souza).

international justice, of the *right perspective*, to wit, that of the *justifiable*.¹⁸⁹ Both courts have decisively contributed to the human being emancipation *vis-à-vis* his own State, to the settlement of a new paradigm in the present scope of international protection, and to the *humanization* of International Law.¹⁹⁰

28. In a lapidary paragraph of this Judgment, regarding to the satisfaction measures for those victimized and the guarantees of non-repetition of libelous acts (as non-pecuniary reparation measures), the Court states:

"the State must guarantee that within a reasonable time the internal process tending to inquire and sanction those responsible for the facts herein yields the corresponding effects, thus giving direct applicability of the protection rules and regulations of the American Convention in domestic law" (paragraph 244).

29. In the above mentioned public hearing of this case, of November 30 and December 1 before this Court, as a reply to one of the questions I posed with regard to the present general perspectives on the matter, one of the witnesses expressed that "the fairest constitutionalists are extremely pessimistic regarding the outcome of what may take place considering the degree of petrification of the Brazilian judicial power."¹⁹¹ My question born in mind the new paragraph 3 of Article 5 of the Brazilian Federal Constitution.¹⁹² My purpose here is not to analyze that Article (it does not even deserve such an analysis), but to refer to it from the American Convention point of view, as applicable law in the *cas d'espèce*.

30. This new provision seeks to grant, in an inexperienced way, constitutional *status*, in the scope of the Brazilian domestic law, only to human rights treaties that are approved by a 3/5 majority of the members of both the House of Representatives and the Senate (thus becoming equivalent to constitutional amendments). Badly conceived, badly drafted and badly formulated, it represents a regrettable backward step regarding to the open model consecrated by paragraph 2 of Article 5 of the Federal Constitution of 1988, which was the result of a proposal of my authorship to the National Constitutional Assembly, as historically documented.¹⁹³ Regarding to previously approved treaties, it creates an *imbroglio*

¹⁸⁹. A.A. Cançado Trindade, "Le développement du Droit international des droits de l'homme à travers l'activité et la jurisprudence des Cours européenne et interaméricaine des droits de l'homme", 16 *Revue universelle des droits de l'homme* (2004) n. 5-8, pp. 177-180; A.A. Cançado Trindade, "The Development of International Human Rights Law by the Operation and the Case-Law of the European and Inter-American Courts of Human Rights", 25 *Human Rights Law Journal* (2004) n. 5-8, pp. 157-160. And, for a broader study, cf. A.A. Cançado Trindade, "Approximations and Convergences in the Case-Law of the European and Inter-American Courts of Human Rights", in *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme* (eds. G. Cohen-Jonathan e J.-F. Flauss), Bruxelles, Nemesis/Bruylant, 2005, pp. 101-138.

¹⁹⁰. A.A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte, Edit. Del Rey, 2006, pp. 3-409.

¹⁹¹. Inter-American Court of Human Rights, *Transcript of Public Hearing...*, *op. cit. supra* n. (3), p. 98 (statement of Mr. João Alfredo Teles Melo).

¹⁹². According to constitutional amendment No. 45, of December 08, 2004.

¹⁹³. For a circumstantial background of paragraph 2 of Article 5 of the Brazilian Federal Constitution, with the references corresponding to documentary sources, cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre, S.A. Fabris Ed., 2003, pp. 597-643; A.A.

that state-centered publicists -insensitive to the needs of protection of the human being- like so much; with regard to the treaties yet to be approved, it creates a possibility of differentiation that autistic and short-sighted publicists -so little acquainted with the achievements of International Human Rights Law - like so much, as well as the representatives that pay attention to them.

31. This backward step creates a risk to the interrelation or indivisibility of the rights protected by the respondent Government (provided for in the treaties that bind it), threatening them with fragmentation or atomization, in favor of the excess of a legal formalism and inscrutability tainted by obscurantism. The new provision is seen with complacency and sympathy by the so called "internationalist constitutionalists," who claim to be jusinternationalists when in fact they are not even close to that, as they only conceive the international legal system through the national Constitution. The constitutionality of the regrettable paragraph 3 of Article 5 is not even proved, and my intention here is not to express an opinion on the matter; what I do affirm in this Opinion, -just as I supported in the conference I lectured on March 31, 2006 in the crowded auditorium of the *Superior Tribunal de Justiça* (STJ) in Brasília, at the end of the public hearings before this Court which took place at the historical External Session of the said Court recently held in Brazil, - is that, as long as the new paragraph 3 of Article 5 of the Brazilian Federal Constitution opens the possibility of undue restrictions in the direct applicability of the set of provisions for the protection of certain human rights treaties in the Brazilian domestic law (being even capable of turning it inapplicable), it openly proves incompatibility with the *American Convention on Human Rights* (Articles 1(1), 2 e 29).

32. From the International Human Rights Law perspective in general, and the provisions of the American Convention in particular, the new paragraph 3 of Article 5 of the Brazilian Federal Constitution is nothing but a regrettable legal aberration. The serious backwards step that it represents, once more reveals that the struggle to safeguard human rights at national and international level is never-ending, as in the constant restart immortalized by the myth of Sisyphus. When descending the mountain to push the rock upward again, we become *aware* of the human condition and of the tragedy surrounding it (as illustrated by the stories of *Electra* and Irene Ximenes-Lopes Miranda).

33. But the struggle has to continue, so that public justice reacts immediately and *ex officio* against the commission of the crime and against victimization, and not encouraged by apparent disgust or hardly by the impulse of the victims' next of kin. The struggle has to continue, because, honestly, there is no choice:

"Sisyphe, revenant vers son rocher, contemple cette suite d'actions sans lien qui devient son destin, créé par lui, uni sous le regard de sa mémoire et bientôt scellé par sa mort. (...) Sisyphe enseigne la fidélité supérieure qui (...) soulève les rochers. (...) La

Cañado Trindade, *A Proteção Internacional dos Direitos Humanos e o Brasil (1948-1997): As Primeiras Cinco Décadas*, 2nd. ed., Brasília, Edit. Universidade de Brasília (Ed. Humanidades), 2000, pp. 1-214; G.R. Bandeira Galindo, *Tratados Internacionais de Direitos Humanos e Constituição Brasileira*, Belo Horizonte, Edit. Del Rey, 2002; Sílvia M. da Silveira Loureiro, *Tratados Internacionais sobre Direitos Humanos na Constituição*, Belo Horizonte, Edit. Del Rey, 2005.

lutte elle-même vers les sommets suffit à remplir un coeur d'homme.
Il faut imaginer Sisyphe heureux."¹⁹⁴

34. Those who feel triumphant with the recent insertion of paragraph 3 in Article 5 of the Brazilian Federal Constitution, hostages of a formalist Law and having forgotten material Law, do not seem to realize that, from the point of view of International Law, a treaty such as the American Convention ratified by a State, binds the latter *ipso jure*, thus resulting immediately and directly applicable, whether it has previously obtained parliamentary approval by either simple or qualified majority. Such domestic provisions, -or let alone, *interna corporis* provisions- are mere *facts* from the international legal system perspective, that is, from the point of view of the legal international system and the international responsibility of the State, they are entirely irrelevant.

35. The international liability of the State for proven violations to human rights remains intangible, regardless of pseudo-legal maneuvers of certain publicists (as the creation of different modalities of prior parliamentary approval of certain treaties with expected legal consequences, the requirement of previous conditions for the direct applicability of humanitarian treaties within domestic law, among others), who merely offer the States empty excuses to try to avoid their commitments of protection of human life in the international adversarial environment of human rights. To sum up, the international protection of human rights constitutes an irreversible human conquest, which shall not be defeated by melancholic circumstances.

36. As we live in a surrealistic world, if not irrational, I had already expressed - in the *Memorial* that I submitted to the inauguration panel of the III National Conference of Human Rights at the National Congress in Brasilia in May 1998 - a warning against eventual and future restrictive constitutional amendments. More than a decade has gone by, and that was exactly and regrettably what has just happened. The empty legal formalism prevailed over the identity of purpose between domestic and international law regarding to the integral protection of rights inherent to the human being. In my 1998 premonition, I warned about the risks of future restrictions to the provisions of Article 5(2) of the Federal Constitution of 1988:

"Modify it to adapt it - that is, to imprison it - to the hermetic and positivist thesis of the "constitutionalization" of treaties, would imply, in my opinion, a conceptual regression in our country in that respect. We have to go beyond the static "constitutionalization" of human rights treaties. Here, again, a fundamental change of mentality becomes essential, with a better understanding of the subject matter. It is not possible to continue thinking within legal categories and schemes created decades ago, facing the reality of a world which no longer exists."¹⁹⁵

¹⁹⁴. A. Camus, *Le mythe de Sisyphe*, Paris, Gallimard, 1942, p. 168.

¹⁹⁵. A.A. Cançado Trindade, "Memorial em Prol de uma Nova Mentalidade quanto à Proteção dos Direitos Humanos nos Planos Internacional e Nacional", 51 *Boletim da Sociedade Brasileira de Direito Internacional* (1998) pp. 90-91.

37. The guarantee of non-repetition of human rights violations, set forth by this Judgment of the Inter-American Court in this case of *Ximenes-Lopes* (paragraph 246, *supra*), is necessarily based on the education and training in the human rights area. In my above mentioned participation of 1998 at the National Congress in Brasilia, I added that the "new mentality" I defended, "shall have to be shown more vigorously," - I emphasized,- "in the core of a more integrated society, characterized by a strong feeling of human solidarity, without which little can the Law progress."¹⁹⁶ That explains the relevance of the formal and non-formal education on human rights; regarding to that, the release and a better knowledge of the jurisprudence of protection of human beings rights of the Inter-American Court become essential, the direct applicability of which is imposed in the domestic law of the States Party.

VI. The Need to Enlarge the Material Content of the *Jus Cogens*.

38. In this Judgment in the case of *Ximenes-Lopes v. Brasil*, the Inter-American Court noticed that the right to personal integrity, consecrated in the American Convention, has as "main purpose" the "imperative prohibition of torture and penalties or cruel, inhuman or degrading treatment," not admitting, therefore, any suspension under "any circumstances" (para. 126). The Court had already noticed it in its Judgment dated August 18, 2000, in the case of *Cantoral Benavides v. Peru* (paras. 95-96). In other words, the above mentioned prohibition falls in the scope of the *jus cogens*.

39. The fact that the direct victim in this case was a mentally disabled person (the first case of this nature before the Court) characterizes the case with an *aggravating circumstance*. In this Judgment, the Court recognizes the "special protection" required by particularly vulnerable people, bearers of a mental disability, -as in the case of *Damião Ximenes-Lopes*, a fatal victim in the *cas d'espèce* (paras. 103-105), - and states that:

"(...) The inherent vulnerability of mentally disabled people is aggravated by the high degree of intimacy which characterizes the treatment of psychiatric diseases, which cause that those people become more susceptible to abusive treatment when they are hospitalized" (para. 106).

40. The protection obligations, - and even more in situation like this, where the victim had a high degree of vulnerability,- are characterized by their *erga omnes* aspect (para. 85), also encompassing interindividual relationships, taking into account the obligation of prevention and due diligence of the State, mainly regarding to people under its care. Public health is a public asset, not a merchandise. In my many papers and Opinions in the core of this Court, I have expressed for so many years my understanding in the sense that all conventional obligations of protection have an *erga omnes* feature. It is particularly hard for me to escape the impression that overwhelms me when I think that during all this time I might have been writing and continue to write for the birds....

41. I would have appreciated it if the Court had done its best when supporting its own *obiter dicta* regarding the matter, but there was no time for such a thing due

¹⁹⁶. *Ibid.*, p. 94.

to the almost unnecessarily frantic rhythm that lately it has imposed upon itself - against my opinion - for making decisions in record time. As I have repeatedly expressed to the majority of the Court, I am against sacrificing the complete grounds of its judgments in the name of productivity. I herein repeat my understanding that I do not consider myself a "production agent" (nor a "human resource"), and I cannot accept that the highest value of a Court is its productivity, due to the chronic deficiencies of the American States Organization (ASO) in the allocation of its resources to the Inter-American Human Rights Court and Commission.

42. The Court could and should have devoted more time to the support of the above mentioned prohibition of *jus cogens*, as it was proceeding until the issue of its transcendental Opinion No. 18 of 2003 (cf. *infra*). This being the first case of mentally disabled people before this Court (para. 123), it could and should have gone deeper on the matter. Bear in mind that an important legacy of the II World Conference of Human Rights (Vienna, 1993), -of which I participated from the first to the last minute, and even during its preparation process, - laid on the recognition of legitimacy of the concern of the whole international community on the living conditions of the population worldwide, especially of its most vulnerable segments.¹⁹⁷

43. Disabled people (more than 600 million, that is, approximately 10% of the world population) form these most vulnerable segments of the population, and the basic principle of equality and non-discrimination gains transcendental importance regarding those people.¹⁹⁸ The Inter-American Convention on the Elimination of All Forms of Discrimination against People with Disabilities of 1999 grants paramount importance to this principle, repeatedly invoked not only in its preamble¹⁹⁹ but also in its operating parts (Articles I(2)(a) e (b), II, III(1), IV(1), V(2) and VI(1) and (5)). However, in this Judgment, the Court refers to it in a way, to my opinion, merely oblique and unsatisfactory (para. 105), when in its own jurisprudence, there are precious elements which could have strengthen its arguments.

44. Thus, in its pioneer and historical Consultative Opinion No. 18 on the *Legal Status and Rights of Undocumented Migrants*, (dated September 17, 2003), internationally claimed and ahead of its time, the Court states that the above mentioned principle of equality and non-discrimination:

"influences all acts of State power, in any of its manifestations, related to the respect and guarantee of human rights. Said principle can effectively be considered as imperative of general international law, as it is applicable to every State, regardless of being a party or not of a certain international treaty, and generates effects regarding third parties, even individuals.

(...) This Court considers that the equality and non-discrimination principle (...) belongs to the scope of *jus cogens* (...). Today no legal act which conflicts with that fundamental principle is

¹⁹⁷. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. I, 2nd. ed., Porto Alegre, S.A. Fabris Ed., 2003, pp. 39, 91-100 and 242-251.

¹⁹⁸. Cf., e.g., G. Quinn and T. Degener *et alii*, *Derechos Humanos y Discapacidad - Uso Actual y Posibilidades Futuras de los Instrumentos de Derechos Humanos de las Naciones Unidas en el Contexto de la Discapacidad*, N.Y./Geneva, United Nations (doc. HR/PUB/02/1), 2002, pp. 1-202.

¹⁹⁹. *Consideranda* 1, 3 and 5.

admitted, nor is any discriminatory treatment for the prejudice of anyone (...).

(...) Non-compliance of these obligations generates the international liability of the State, and this is much more serious as that non-compliance violates peremptory provisions of International Human Rights Law" (paras. 100-101 and 106).

45. Regarding this item, I issued, in the above mentioned Consultative Opinion No. 18, a long Concurring Opinion (paras. 1-89), in defense of the broadening of the *jus cogens* material content and the wide scope of the corresponding *erga omnes* protection obligations. That has invariably been my position in the core of this Court, as proved by my Separate Opinions in the cases of *Massacre de Mapiripán v. Colombia* (Judgment of September 15, 2005, paras. 25-29 of the Opinion), *Acosta Calderón v. Ecuador* (Judgment of June 24, 2005, para. 7 of the Opinion), *Yatama v. Nicaragua* (Judgment of June 23, 2005, paras. 6-8 of the Opinion), *Comunidade Moiwana v. Suriname* (Judgment of June 15, 2005, para. 30 of the Opinion), *Caesar v. Trinidad e Tobago* (Judgment of March 11, 2005, paras. 85-92 of the Opinion), *Massacre de Plan de Sánchez v. Guatemala* (merits, Judgment of April, 2004, paras. 29-33 of the Opinion; and reparations, Judgment of November 19, 2004, para. 5-6 of the Opinion), *Tibi v. Ecuador* (Judgment of September 7, 2004, paras. 26-35 of the Opinion), *Irmãos Gómez Paquiyaury v. Peru* (Judgment of July 8, 2004, paras. 37-44 of the Opinion), *Myrna Mack Chang v. Guatemala* (Judgment of November 25, 2003, para. 29 of the Opinion), *Hilaire, Constantine e Benjamin e Outros v. Trinidad e Tobago* (preliminary objections, Judgment of September 1, 2001, para. 38 of the Opinions; and merit, Judgment of June 21, 2002, para. 16 of the Opinion), *Trujillo Oroza v. Bolívia* (Judgment of February 27, 2002, para. 18 of the Opinion), *"Meninos de Rua" (Villagrán Morales e Outros) v. Guatemala* (reparations, Judgment of May 26, 2001, para. 36 of the Opinion), *Bámaca Velásquez v. Guatemala* (Judgment of November 25, 2000, para. 27 of the Opinion), *Las Palmeras v. Colômbia* (preliminary objections, Judgment of February 4, 2000, para. 6 of the Opinion); and *Blake v. Guatemala* (preliminary objections, Judgment of July 2, 1996, paras. 11 and 14 of the Opinion; and merit, Judgment of January 24, 1998, paras. 23-30 of the Opinion; and reparations, Judgment of January 22, 1999, para. 39-42 of the Opinion); and, apart from that, as corroborated in my Concurring Opinions in the cases *Maritza Urrutia v. Guatemala* (Judgment of November 27, 2003, paras. 5-10 of the Opinion), *Barrios Altos v. Peru* (Judgment of March 14, 2001, para. 11 of the Opinion), and by my Dissenting Opinion in the case of *Irmãs Serrano Cruz v. El Salvador* (preliminary objections, Judgment of November 23, 2004, paras. 32 and 39-43), plus many other Opinions by myself in precautionary protection ordered by this Court.²⁰⁰

46. Therefore, I believe that the Court could and should have taken the arguments of its most advanced jurisprudence for the matter at issue when analyzing this Judgment in the case of *Ximenes-Lopes*. Perhaps it would have done so had it given itself more time for discussion. As stated by the renown adage, *you*

²⁰⁰. Cases of *Crianças e Adolescentes Privados de Liberdade no Complexo do Tatuapé da FEBEM v. Brasil* (of November 30, 2005, paras. 24-26 of my Concurring Opinion); *Prisões de Mendoza v. Argentina* (of June 18, 2005, paras. 7-20 of my Concurring Opinion); *Povo Indígena de Sarayaku v. Ecuador* (of July 6, 2004, para. 8 of my Concurring Opinion; and of June 17, 2005, paras. 20-26 of my Concurring Opinion); *Comunidades do Jiguamiandó e do Curbaradó v. Colômbia* (of March 15, 2005, paras. 8-10 of my Concurring Opinion); *Comunidade de Paz de San José de Apartadó v. Colômbia* (of March 15, 2005, paras. 8-10 of my Concurring Opinion); *Emissora de Televisão 'Globovisión' vs. Venezuela* (of September 4, para. 13 of my Concurring Opinion); *Prisão de Urso Branco vs. Brasil* (of July 7, 2004, para. 8 of my Concurring Opinion); and *Povo Indígena Kankuamo v. Colômbia* (of July 5, 2004, para. 10 of my Concurring Opinion).

cannot rush perfection. Moreover, until the beginning of 2004, the Inter-American Court was one of the contemporary international Courts which mostly contributed to the evolution of the material content of the *jus cogens*, followed by the Criminal International Court *ad hoc* for former Yugoslavia. For any reason which escapes my understanding, lately it seems to have refrained its doctrinal and jurisprudential construction on the matter.

47. To my belief, in this Judgment in the case of *Ximenes-Lopes*, when determining the violations not only of Articles 4 and 5 of the Convention (acknowledged by the State itself), but also of Articles 8(1) and 25 of the Convention, it should have gone beyond regarding the latter, broadening the *jus cogens* scope also to the right of access to justice *lato sensu*, including the guarantees of due legal process therein. In that sense, I have ruled within this Court in the two last years, for example, *inter alia*, in the arguments of my Separate Opinions in the cases of *López Álvarez v. Honduras* (Judgment of February 01, 2006, paras. 53-55 of the Opinion), *Massacre de Pueblo Bello v. Colombia* (Judgment of January 31, 2006, paras. 63-65 of the Opinion), *Baldeón García v. Perú* (Judgment of April 6, 2006, para. 10 of the Opinion), and *Comunidade Indígena Sawhoyamaya v. Paraguai* (Judgment of March 29, 2006, para. 36 of the Opinion). I hope this Court soon has the courage to take this new qualitative step in its jurisprudential construction, since it did not take it in this Judgment of this case of *Ximenes-Lopes*. From the very day on which it takes it - I hope very soon - it shall be contributing to make it more difficult to repeat stories like Electra's and Irene's without punishment.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary