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 hypothetic 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